DAMAGES UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT

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"The Federal Employers' Liability Act," according to Mr. Justice Douglas, "was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations."[1] It has largely accomplished that purpose. Thanks in no small measure to a Supreme Court which has been vigilant in its protection of the rights which the Act gives the workingman, the railroads have been made to pay for the human beings they have damaged or destroyed. Although the Act does not make the railroads insurers of their employees, it is a rare case indeed when there is a total failure of compensation for the victims of a railroad accident.[2]

But while the substantive liability of the railroads has become thus firmly established, much less attention has been given to the amount the railroads must pay for the legs, eyes, arms and lives they consume. It is not enough that the employers provide *some* compensation; instead the Act contemplates that they should pay *fair* compensation. It is especially true of FELA actions that, as one scholar says, "the crucial controversy in personal injury torts today is not in the area of liability but of damages."[3]

The Act itself sets out no measure of damages. The courts, quite properly, have held that awards for injuries are to be determined according to the principles developed for common law negligence actions, and that recoveries for death should be commensurate with the pecuniary

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[1] Wilkerson v. McCarthy, 336 U. S. 53, 68 (1949) (concurring opinion).

[2] DeParcq, *A Decade of Progress under the Federal Employers' Liability Act*, 18 L. & CONTEMP. PROB. 257, 279 (1953).

[3] Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 L. & CONTEMP. PROB. 219, 221 (1953). And see Hare, *Book Review*, 8 ALA. L. REV. 440, 441 (1956): "The greatest paradox in the field of torts has always been the technical precision required in every other aspect of the trial in contrast with the slovenly treatment of unliquidated damages. No business man would tolerate for a second a procedure which put a price on his property or his time in this vague and slipshod way. How have judges for a hundred years been telling juries to set a price on the loss suffered by the plaintiff in the way of physical impairment and bodily 'pain? The customary instruction to the jury is itself an admission of ineptness—'Gentlemen of the jury, there is no yardstick which you can use, etc.' A business buyer or seller would throw up his hands at such guess work. The modern trial of a law suit offers a jury sensible assistance in calculating a verdict for the plaintiff. Belli's is the first major legal text which has fertilized this arid field, and its importance is incalculable. All the legal scholarship in the field of torts is preliminary to the ultimate question of 'how much.' Until the amount is set it is but sounding brass and a tinkling cymbal. It is incredible that it was left for the past decade to devote any serious attention to this consummation of the trial."

loss according to the rules developed under Lord Campbell's Act and comparable state wrongful death statutes.[4] Nevertheless it is possible to consider FELA damage rules as a distinctive branch of the law: the frequency and severity of injuries to railroad workmen has required courts to answer questions not previously presented or settled in tort law generally, and the insistence that the measure of damages must be governed by a uniform federal standard has produced more coherent results than is the case with other torts where each state is free to follow its own vagaries.[5]

Before examining in detail the rules which have thus emerged and the problems still undecided, it is well to indicate our own faith as to damages in this class of litigation. We have no wish to press for the "more than adequate award"; such an achievement, were it possible, would be a Phyrric victory for injured employees. Truly excessive verdicts would be an invitation to legislative action setting limits on recovery, or remitting railroad workers to notoriously inadequate state workmen's compensation systems. At the same time we insist on the right of the injured person to full and fair compensation for his injuries. Excessive concern for the corporate pocketbook has led some courts to hold the employer liable for only part of the loss he has caused, and to require the injured person, or his widow, to shoulder the balance of the loss.[6] This seems to us a perversion of the Act. The sleek new lightweight passenger trains which the railroad industry is now purchasing cost millions of dollars, but no one suggests that because the expense is so vast, General Motors or Budd should sell these trains to the railroads at less than cost. By the same token, the railroads should pay full price for a leg or a life.

Of course there is no price tag on people. It is easier for us to demand full and fair compensation than to decide what amount fits this description in a particular case. There are rules which set out the elements to be considered, and we shall shortly examine these rules in detail. The problem is in translating these elements into dollars and cents. A smart and industrious switchman makes $400 a month at age 24, when he is permanently disabled. What would his earning capacity have been at age 40? At 60? How much must be paid to orphaned children to compensate them, fully and fairly, for the loss of the care and guidance they might have expected from their father? How many dollars should the railroad pay a person forced to go through life with the devastating pain of a "phantom limb"?

We do not know the answers to these questions—nor do appellate

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[4] *E.g.*, Michigan Central R. Co. v. Vreeland, 227 U. S. 59, 69-72 (1913).

[5] Following the example of the courts, however, we have cited non-FELA cases from time to time in this article where they deal with common law principles or with the interpretation of a wrongful death act which uses the same standard for damages as does FELA.

[6] See pp. 478-82 below.

judges. The best approximation to fair answers is likely to be achieved by leaving such matters to the common sense and the enlightened conscience of a jury. The jury should be provided with all the data that expert testimony can give. It should have the benefit of careful instructions as to the things it is to consider. It should be protected from appeals to passion and prejudice. If these conditions are met, the answer of the jury should be final. Questions involved in assessing damages are of a sort which juries are peculiarly well suited to decide. If ultimate decision of these questions is taken away from the jury, then that ancient and honorable institution becomes useless save for Fourth of July orations.

Against this background of our beliefs, we turn now to the rules for measuring damages in an action under the Federal Employers' Liability Act. We look first to the basic amount of loss, the elements for which recovery can be had. Thereafter we shall consider the period for which this loss is compensable, the reduction to present worth of the amount thus indicated, and finally, appellate review.

I. Basic Amount of Loss

Personal injury actions

There is no great difficulty in computing damages for a minor injury, which has completely healed by the time of trial. Plaintiff can recover his lost earnings, his medical expenses, and a reasonable allowance for the pain caused by the injury. Practically all such cases are settled, since the amounts involved are small, and the only real dispute is as to the allowance for intangibles.[7]

Difficulty arises when the injury is such as to cause some form of permanent harm, whether partial or total. Because the losses to be compensated for stretch over many years, they will add up into sizable amounts, well worth fighting about. And the long look into the future which is demanded of the jury necessarily requires it to resolve many imponderables, which reasonable men can evaluate in different ways. Finally, while damages up to the date of trial need only be established by a fair preponderance of the evidence, future damages must be demonstrated with reasonable certainty.[8]

Perhaps the most important factor for which the permanently disabled person can recover is the injury to his earning power. A useful concept developed by common law judges is that the recovery is not for the lost future earnings themselves, but for the impairment of earning *capacity*.[9]

[7] Perhaps it is because most injuries do heal, and calculation of damages in such cases is so simple, that so few FELA claims ever involve any litigation at all. One study finds that only 2% of the claims are litigated and still fewer have full-blown trials. Conard, *Workmen's Compensation: Is It More Efficient than Employer's Liability?*, 38 A.B.A.J. 1011, 1014 (1952).

[8] Watt v. Nevada Cent. R. Co., 23 Nev. 154, 175, 44 Pac. 423, 429 (1896); DeParcq, *Evaluation for Settlement or Trial*, 24 Tenn. L. Rev. 172, 177 (1956). But *cf.* McCormick, Damages 309 (1935).

[9] *Id.* at 309-11; James, *Damages in Accident Cases*, 41 Cornell L. Q. 582, 598-9 (1956).

In automobile accident cases and similar tort litigation, this is of very great importance, for it permits recovery though the injured person was out of work or though he was so wealthy that he did not need to work.[10] Neither of these situations is likely to arise in a FELA case; by definition the injured person will have been employed at the time of the accident,[11] and his earnings at that time will be the principal proof of the value of his earning capacity.[12] Though all past earnings would be relevant, plaintiff will usually introduce only his earnings record for a year or so before the accident. Because of the tendency for wages to increase, an earnings history over a longer period is likely to show average earnings smaller than those plaintiff was actually enjoying when he was injured.

Of course the jury is not bound by the history of past earnings. Earning power is not a constant, and the jury is free to assess it realistically. The jury, considering all the innate qualities, background, and training of the injured person, must decide what were his future prospects for an increase, or even a decrease, in his earning capacity.[13] Appellate courts, in holding a verdict excessive by comparing it to the present worth of future earnings as shown by past earning experience, have sometimes overlooked the possibility that the jury may have believed the injured person's earnings would have increased. Other courts have viewed the matter more sensibly. Thus in one case where the highest earnings plaintiff had had before the injury were $250 a month, the reviewing court held the jury could have awarded damages on the basis of $300 or $350 a month, saying:

> It cannot be assumed that his earning power would not increase in future years. On the evidence adduced the jury had a right to, and probably did, find that the earning power of the plaintiff would increase.[14]

In this manner "the law recognizes the possibilities open to ambition."[15] By the same token, defendant has a right to argue, and the jury to decide, that some allowance should be made for an eventual decline

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[10] *Id.* at 210 n. 3. And see note 97 *infra.*

[11] But *cf.* O'Donnell v. Great Northern Ry. Co., 109 F. Supp. 590 (N. D. Calif. 1951), where plaintiff was allowed to recover on a 12 months basis even though in the past a pollen allergy had prevented him from working during two or three months of the year. Since the allergy was not only seasonal but also locational, the court held that he had capacity to work for the full 12 months.

[12] McCORMICK, DAMAGES 311 (1935). But *cf.* Muratore v. United States, 100 F. Supp. 276 (S.D.N.Y. 1951), where the court said that the past earnings of a shipfitter were unduly high, because of the war situation and resulting overtime, and assumed his future earnings would have been a smaller amount; Imperial Oil, Ltd. v. Drlik, 234 F. 2d 4, 11-2 (6th Cir. 1956).

[13] Hallada v. Great Northern Ry., 244 Minn. 81, 96, 69 N.W. 2d 673, 685 (1955), *cert. denied* 350 U. S. 874 (1955).

[14] Bartlebaugh v. Pennsylvania R. Co., 78 N.E. 2d 410, 414 (Ohio App. 1948), *rev'd on other grounds* 150 Ohio St. 387, 82 N.E. 2d 853 (1948).

[15] McCORMICK, DAMAGES 300 (1935).

of earning power because of the abatement of mental and physical vigor consequent upon the passage of time.[16]

A more perplexing problem is the extent to which evidence can be introduced bearing on the possibility of future changes in earning capacity. It is proper to show that between the time of the injury and the time of trial wage increases have been made for persons in plaintiff's position, which he would have had were he still working.[17] And plaintiff can show any fixed promotion scheme which would assure him of eventually increased earnings.[18]

Can the plaintiff go further, and introduce evidence that his capabilities are such that future promotion is likely, and demonstrate by such evidence the possible income he would receive after such promotions? An old Supreme Court decision, decided prior to adoption of FELA, said that it would be error to allow such testimony, on the ground that it is too speculative.[19] We believe that this decision is no longer authoritative. It speaks from a day when restrictive rules of evidence were more highly esteemed than they are at present. All agree that the jury may take future increases into account; any evidence bearing on the possibility of such increases is relevant, and should be admissible, with the jury determining how much weight to give it. The requirement of reasonable certainty applies to the end result, the earning capacity as proven to the jury, and not to the bits and pieces of evidence which make up that proof. The only limit on admissibility of evidence showing possible future income should be the power of the judge to exclude particular evidence if its probative value is substantially outweighed by the risk that its admission will create substantial danger of misleading the jury.[20]

The view which we espouse was adopted in a notable recent decision by the New Mexico Supreme Court in a common law injuries action. The plaintiff at the time of his injury was taking a training course as an automobile mechanic, and receiving $100 a month as a laboratory assistant. Testimony was admitted from the head of the school that plaintiff's work was outstanding, that he was capable of becoming a "topflight" mechanic, and that "topflight" mechanics make from $75 to $150 a week. After an elaborate review of the authorities, the court held this evidence proper, saying:

> * * *any evidence that would fairly indicate his present earning capacity, and the probability of its increase or decrease in the future ought to be admitted. It may be that such testimony

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[16] *See* Loftin v. Wilson, 67 So. 2d 185, 189 (Fla. 1953).

[17] Southern Pac. Co. v. Guthrie, 180 F. 2d 295, 302-3 (9th Cir. 1949), *cert. denied* 341 U. S. 904 (1951).

[18] Richmond & D. R. Co. v. Elliott, 149 U. S. 266 (1893).

[19] *Ibid.*

[20] See UNIFORM RULES OF EVIDENCE, RULE 45; DeParcq, *The Uniform Rules: A Plaintiff's View*, 40 MINN. L. REV. 301, 327-8 (1956).

> is speculative, as asserted by defendant; but no more so than any that has for its purpose the proof of future action or events. It is all problematical at best. It is not questioned that mortality tables are admissible, but possibly not one time in fifty would the life expectancy of any individual come within a year of the actual length of his life. It is, to say the least, problematical whether he would continue to live, continue in health, continue to work, continue to work with much the same effort and ability he has shown in the past, continue to have the desire and the opportunity to work. Also, that the amount of wages paid him and those following his occupation generally in the past, will continue to be paid; that the wage scale will not be materially affected by depression, strikes, inflation, or war; that interest rates will remain much as they are. However 'speculative' such testimony may be, it is the best that can be produced to establish earning capacity over a period of years. A jury of twelve average citizens ordinarily can be depended on to assess damages fairly, after they have heard and considered such evidence.[21]

Plaintiff's loss in a personal injury action is measured by his gross earnings.[22] His personal living expenses are not deducted, as they would be in a death action, since the injured person must continue to bear those expenses, and they are not lessened by the injury. It is gross earnings before taxes, rather than take-home pay, which provides the measure. The effect of income taxes in tort litigation has stirred up much excitement in the last few years, more, perhaps, than is justified by its difficulty. Confusion has come from failure to distinguish what must be regarded as four quite distinct questions. 1. Should income tax be deducted from earnings in determining the damage to earning capacity of an injured employee? 2. Should income tax be deducted from earnings in determining the lost contributions the widow might have expected from a deceased employee? 3. Should the trial court instruct the jury that the amount it awards plaintiff is not taxable? 4. May defendant's lawyer argue to the jury that the amount of the award is not taxable? We shall take up each of these questions in its proper place. Our answer to the 1st, 3rd, and 4th questions will be an unequivocal "No." As we shall see, the 2nd question poses a more complicated problem which cannot yet be resolved with assurance.

We are here confronted with the first question, deduction of income

[21] Turrietta v. Wyche, 54 N.M. 5, 16, 212 P. 2d 1041, 1047-8 (1949). The passage here set out was quoted with approval by the Illinois Supreme Court in Allendorf v. Elgin, J. & E. Ry. Co., 8 Ill. 2d 164, 133 N.E. 2d 288, 294 (1956). See also Houlihan v. Turner Construction Co., 139 F. Supp. 88, 92 (D.R.I. 1956), where evidence was held proper that an oiler, earning $91 a week at the time of his injuries, had reached the point where he could qualify for the job of crane operator at a much higher wage.

[22] *Cf.* Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 554 (1886); Rouse v. New York, C. & St. L. R. Co., 349 Ill. App. 139, 110 N. E. 2d 266 (1953).

taxes in measuring the lost earning capacity of an injured employee. This is the easiest question, for while there is some difference of view on the other facets of the problem, apparently all agree that gross earnings before tax must be the measure in an injuries action. So far as we can find, the only American decision to the contrary is the first decision of the Ninth Circuit in *Southern Pacific Co. v. Guthrie*,[23] and that court, on rehearing when it studied the question more closely, substantially repudiated that view.[24] Subsequent cases have presented no ambiguity, and the matter is now clear enough that an able federal judge, after studying all the authorities, could conclude in a very recent case:

> The courts seem well agreed that the future tax liability is subject to too many variables to be a matter of consideration in an award for future impairment of earning capacity.[25]

And the learned commentators support this result.[26] By the same token, other deductions, such as for railroad retirement, are not to be considered in measuring the destroyed earning capacity.[27]

Valuation of the impaired earning capacity is complicated where the plaintiff is not totally disabled,[28] but retains some residual earning

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[23] 180 F. 2d 295 (9th Cir. 1949).

[24] 186 F. 2d 926, 928 (9th Cir. 1951), *cert. denied* 341 U. S. 904 (1951).

[25] Combs v. Chicago, St. P., M. & O. Ry. Co., 135 F. Supp. 750, 751 (S. D. Iowa 1955). *Accord*: Stokes v. United States, 144 F. 2d 82 (2d Cir. 1944); Chicago & N. W. Ry. Co. v. Curl, 178 F. 2d 497 (8th Cir. 1949); O'Donnell v. Great Northern Ry. Co., 109 F. Supp. 590 (N. D. Calif. 1951); Hall v. Chicago & N. W. Ry. Co., 5 Ill. 2d 135, 125 N. E. 2d 77 (1955); Dempsey v. Thompson, 363 Mo. 339, 251 S.W. 2d 42 (1952); John F. Buckner & Sons v. Allen, 289 S.W. 2d 387 (Tex. Cir. App. 1956); Texas & N.O.R. Co. v. Pool, 263 S.W. 2d 582 (Tex. Cir. App. 1953). Decisions from Canada, Australia, Scotland and New Zealand are said to be to the same effect. Note, 51 COLUM. L. REV. 782 (1951); Anno., 9 A.L.R. 2d 320. And an English decision which attracted much attention had held that taxes are not to be deducted, Billingham v. Hughes, [1949] 1 K.B. 643 (C.A.). A contrary view has now been taken, however, by a divided opinion of the House of Lords. British Transp. Comm'n v. Gourley, [1955] 3 All E. R. 796 (H.L.), criticized 69 HARV. L. REV. 1496 (1956).

[26] Notes, 51 COLUM. L. REV. 782 (1951), 32 TEX. L. REV. 108 (1953), 32 NEB. L. REV. 491 (1953), 8 SOUTHWESTERN L. J. 97 (1953), 69 HARV. L. REV. 1496 (1956); Comments, 33 B.U.L. REV. 114 (1953), 21 U. of CHI. L. REV. 156 (1953).

[27] Chicago & N. W. Ry. Co. v. Curl, 178 F. 2d 497 (8th Cir. 1949); *cf.* Sinovich v. Erie Railroad Co., 230 F. 2d 658 (3d Cir. 1956); Wawryszyn v. Illinois Cent. R. Co., 10 Ill. App. 2d 394, 135 N.E. 2d 154 (1956).

[28] Plaintiff cannot recover for total and permanent disability if the injuries can be cured or alleviated by a simple and safe surgical operation, but this rule has been applied most cautiously. Thus it has been held that the dangers of the operation are such that plaintiff need not submit to an operation to cure a ruptured intervertebral disc, Lewis v. Pennsylvania R. Co., 100 F. Supp. 291, 294, (E. D. Pa. 1951), or a lacerated low lumbar disc, Bordanaro v. Burstiner, 151 N.Y.S. 2d 450 (Sup. Ct. 1956), or a hernia, Missouri Pac. R. Co. v. Bryant, 213 Ark. 149, 209 S.W. 2d 690 (1948), for the benefit of his employer. It is interesting to compare the treatment of hernias under workmen's compensation statutes. *E. g.*, National Mut. Cas. Co. v. Lowery, 136 Tex. 188, 148 S.W. 2d 1089 (1940).

capacity. The rule in such a case is that plaintiff is entitled to the amount he normally would have earned during the rest of his life had he not been injured, but that from this must be deducted the sum which he may reasonably be expected to earn despite his injuries.[29] Determining the value of this residual earning capacity is one of the most difficult and conjectural problems in this whole subject matter. Suppose, for example, that a young brakeman loses an arm. It is clear enough that he can no longer work as a brakeman, but it is much less clear that he has totally and completely lost his earning capacity in all occupations. Indeed it is even possible that he might be able to readjust, go into a different field, and like many other people with one arm, be quite successful. Such a case may well lead to introduction of conflicting evidence as to whether the size of the stump permits use of a prosthetic device; if it does, defendant will doubtless present expert testimony as to all the things that can be accomplished with an artificial arm and plaintiff will meet that, by other testimony or by cross-examination, as the case permits.[30]

But after all this has been done, it is still extraordinarily difficult to estimate how much a maimed person will earn for the rest of his life in an occupation which he has never yet tried. There are tables available indicating the percentage of disability caused by loss of a member or members at a given age,[31] and these should be admissible for whatever they may be worth. But the education, intelligence, and experience of the particular plaintiff make generalized tables an inexact guide.

And so, as on many other matters, there seems no solution save to give the jury all the data possible, and leave it to the jury to make its own best guess. The question is sure to be fully discussed by both sides in closing argument. Plaintiffs' counsel are likely to find that the wisest policy is to be frank with the jury about the possibility of future earnings by the partially disabled plaintiff, and to suggest to the jury a reasonable and realistic figure for the amount plaintiff may be able to earn.

In addition to the damages for loss of earning capacity, plaintiff may recover for medical expenses, past and future, such as the attendance of doctors and nurses, hospital care, and medicines and appliances. The amount of these expenses, of course, must be proved; even with regard to past expenses actually incurred, the safer practice is to produce a physician to testify that the charges are reasonable and customary.[32]

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[29] *E.g.*, Hallada v. Great Northern Ry. Co., 244 Minn. 81, 69 N.W. 2d 673 (1955), *cert. denied* 350 U.S. 874 (1955). As to the problems of computing present worth where there is residual earning capacity, see p. 463 below.

[30] For description of such a case, see DeParcq, *Foundations for Liability*, 24 TENN. L. REV. 182 (1956).

[31] DUBLIN & LOTKA, THE MONEY VALUE OF A MAN 106 (Rev. ed. 1946); MCBRIDE, DISABILITY EVALUATION (5th ed. 1953).

[32] The physician who treated plaintiff has been allowed to testify as an expert that the fee he charged is reasonable. Lange v. Kansas City So. Ry. Co., 290 P. 2d 71 (Mo. 1956). See generally MCCORMICK, DAMAGES 323-7 (1953). Of

This requirement that the charge be "reasonable" is a powerful weapon in the hands of a court which thinks a verdict is too large. In a case recently tried by the senior author, the evidence showed that plaintiff, completely paralyzed from the waist down, would require the services of a daily attendant. Plaintiff called a doctor, familiar with the area where plaintiff lived, who testified that the reasonable cost of an attendant for plaintiff would be $10 per day. There was no other testimony on this subject. But the appellate court held the jury was mistaken in awarding recovery for this element of damages on the basis of $10 per day.

> * * *[W]e think it is unrealistic to predicate the assessment of plaintiff's damage therefor exclusively on the cost of an attendant employed on a day-to-day basis. In view of the type of non-professional assistance plaintiff will require, it appears unreasonable to us to claim that he cannot obtain the services of a competent daytime attendant in Thief River Falls for an average sum less than $304.16 per month for the estimated balance of his lifetime.[33]

A major element of recovery in a FELA injuries action is an allowance for future pain, suffering and disability. It has long been clear that the plaintiff is entitled to such recovery.[34] But quite recently, as the sums awarded on this account have become substantial, the propriety of such damages has been challenged.[35] Professor Jaffe studies the rationalizations offered to defend an award for pain and suffering, finds them unconvincing, and concludes:

> Insurance aside, it is doubtful justice seriously to embarrass a defendant, though negligent, by real economic loss in order to do honor to plaintiff's experience of pain. And insurance present, it is doubtful that the pooled social fund of savings should be charged with sums of indeterminate amount when compensation performs no specific economic function.[36]

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course by the more common rule, plaintiff can recover the reasonable value of services gratuitously performed, as by a member of his family. *Id.* at 324-5.

[33] Ahlstrom v. Minneapolis, St. P. & S. S. M. R. Co., 244 Minn. 1, 28-9, 68 N. W. 2d 873, 890 (1955).

[34] Chesapeake & O. R. Co. v. Carnahan, 241 U. S. (1916); McCORMICK, DAMAGES 315-9 (1935). Several courts have noted that, because of this element of pain and suffering, it is fallacious to suppose that a verdict is excessive merely because it equals or exceeds the maximum amount which the jury could properly have found for lost earnings and medical expenses. Schlatter v. McCarthy, 113 Utah 560, 561, 198 F. 2d 473, 474 (1948); Thompson v. Barnes, 236 S. W. 2d 656, 661 (Tex. Civ. App. 1950); Delaney v. New York Cent. R. Co., 68 F. Supp. 70 (S.D.N.Y. 1946).

[35] In Loftin v. Wilson, 67 So. 2d 185 Fla. (1953), the verdict of $300,000 included $207,000 for future pain and suffering. The court found this amount excessive.

[36] Jaffe, *Damages for Personal Injury: The Impact of Insurance,* 18 L. & CONTEMP. PROB. 219, 225 (1953).

And Professor Bauer, though less philosophical, paints a graphic picture of the dangers which awards for pain and suffering may present:

> Nowhere is it easier for a skillful lawyer for the plaintiff to lead a jury into wild and fanciful and emotional commutations than here, for pain and suffering are among the universally abhorred experiences of mankind, and the average juror can easily have his already great and proper sympathy with the plaintiff augmented into a perfect willingness to find a verdict of almost astronomical proportions if the court does not control the jury by means of the necessary and proper instructions.[37]

Just what these necessary and proper instructions are to be is never made clear. The emptiness of verbal formulae in this area is well illustrated by a Florida case in which a verdict of $300,000, of which $207,000 was said to be an allowance for pain and suffering, was set aside as having been governed by "sentimental or fanciful standards." The court undertook to lay down the proper test:

> The award for pain and suffering must be limited to compensation. * * * Compensation in this connection is to be understood as describing an allowance looking toward *recompense* for, or made because of, the suffering consequent upon the injury.[38]

What would a jury so instructed know that it did not know before?

The justification for pain and suffering awards can be illustrated by the facts of a recent common law case in Connecticut. A 36 year old man was injured through the negligence of the defendant. The injury quickly healed—to the extent that it ever would—and thus there was no claim for future medical expenses or loss of earnings. But the consequences of the injury were such that the plaintiff would have a 35% to 45% loss of use of one arm, and would suffer pain, for the rest of his life. He was awarded $44,000, reduced by the appellate court to $32,000.[39] Would Professor Jaffe allow no recovery? Certainly the plaintiff in that case was worse off because of the accident than he had been before. No one would deny that he has been harmed. Should he bear that harm himself, or should the erring railroad be required to bear it? Those who object to allowing damages for pain, suffering and disability seem to be worried principally by the fact that the defendant is required to give up something of economic value to compensate for a non-economic loss. But our society has long passed the day when only

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[37] Bauer, *Fundamental Principles of the Law of Damges in Medico-Legal Cases*, 19 TENN. L. REV. 255, 270-1 (1946).

[38] Loftin v. Wilson, 67 So. 2d 185, 189 (Fla. 1953). Compare James, *Damages in Accident Cases*, 41 CORNELL L. Q. 582, 604 (1956): " * * * the language of compensation has real significance only in framing instructions which are calculated to put the jury in a proper frame of mind to exercise self-restraint, and in furnishing an appropriate frame of reference for supervisory action by the court in cutting down verdicts felt to be excessive."

[39] Gorczyea v. New York, N.H. & H.R. Co., 141 Conn. 701, 109 A. 2d 589 (1954).

economic values were thought real and only property interests entitled to judicial protection. Our concern for the dignity of the individual has led us to recognize that his rights of personality are fully as important as are property rights.[40] If these rights of personality are injured, plaintiff is the poorer. As between an innocent plaintiff and a negligent defendant, it is not difficult to decide who should bear this loss.

The same reasoning which supports recovery for pain and suffering permits recovery also, where the injury has caused scars, mutilation, or disfigurement, for embarrassment and humiliation.[41] Take, for example, the case of the brakeman who lost an arm. When computing an allowance for pain and suffering, the jury will consider, if established, symptoms of a "phantom limb" with its resulting burning sensation and pain. For embarrassment and humiliation they will look to quite a different set of experiences: people staring at plaintiff on the street; people stopping him and asking questions; the need for someone to help him with his food in a restaurant; the inquiries of his children as to why he cannot play with them as any other father plays with children. A money recovery will not end these unpleasant experiences. It will provide plaintiff with the means to indulge in other pleasures which may help to make up for his embarrassment and humiliation.

Of course there is no precise mathematical rule by which the damages for pain, suffering and disability, or for embarrassment and humiliation, can be measured. Medical testimony can show the reality and the permanence of the pain, but we believe that lay testimony is even more valuable. The plaintiff himself can give very helpful testimony in a genuine and legitimate case of pain and suffering, and the testimony of nurses, co-employees, or others who have cared for or observed the plaintiff, will be useful.[41a] Despite the availability of such testimony, courts show a distressing willingness to evaluate the pain and suffering on the basis of a cold printed record. The Minnesota Supreme Court, relying presumably on judicial notice, has announced that suffering "will vary and generally decrease as time goes on," and that embarrassment and humiliation "should greatly decrease as time passes."[42] Apparently a different rule applies as people grow older. The Ninth Circuit, in a case involving a 59 year old man, said:

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[40] For a criticism of the extent to which the equity courts have gone in this direction, see Wright, *The Law of Remedies as a Social Institution,* 18 U. of DET. L. J. 376, 382-6 (1955). For recognition of a right to recover damages for "loss or impairment of power and capacity of work and mobility, which is the right to be a normal human being," see note 97 *infra.*

[41] *E.g.,* Erie R. Co. v. Collins, 253 U. S. 77 (1920); McCORMICK, DAMAGES 317 (1935); and authorities cited at DeParcq, *Evaluation for Settlement or Trial,* 24 TENN. L. REV. 172, 176, n. 10 (1956).

[41a] For good examples of the kind of helpful testimony of this sort that a nurse can give, see Smith v. Wichita Transp. Corp., 179 Kan. 8, 293 P. 2d 242, 249 (1956); Mathis v. Atchison, T. & S. F. Ry. Co., 300 P. 2d 482 (N. Mex. 1956).

[42] Ahlstrom v. Minneapolis, St. P. & S.S.M. R. Co., 244 Minn. 1, 30, 68 N.W. 2d 873, 891 (1955).

> It is common knowledge that for a man of Guthrie's age, aches and pains arising out of physical disabilities do not ordinarily lessen, as they might for a younger man.[43]

In an effort to provide some guidance to the jury in the evaluation of these non-economic elements of damages, it has recently been usual for plaintiffs' lawyers to suggest, in argument to the jury, a modern sum per day which might be appropriate compensation. Thus $10,000 sounds like, and is, a very large sum of money—but the jury may see it in a different light when it realizes that this is less than $1 per day for a man with an expectancy of 30 years.

If this technique is used moderately and responsibly, it would seem to be a help to the jury rather than otherwise. And indeed the earliest reported case to comment on the technique found it unobjectionable, saying that it falls within the rule that counsel in argument to the jury may suggest and state what he believes the evidence shows in the way of a damage award.[44]

In a recent case, tried without a jury, the court awarded $20,400 for pain and suffering of a 62 year old man, calculated as follows: $100 a day for the first month; $50 a day for the second month; $20 a day for the next four months; and $100 a month for the balance of his life.[44a] The Sixth Circuit affirmed the award, saying:

> We are more concerned with the result, reached by a reasonable process of reasoning and consistent with the evidence, than we are with which one of several suitable formulas was actually used by the juror or judge. It is not necessary for us to adopt the method used by the District Judge as a rule of law for the proper disposition of such an issue, and we do not do so. In our opinion, it was not an arbitrary and unreasonable approach to the problem presented and its application was so adjusted in the present case as to be consistent with the evidence and to reach a result which does not appear to us to be manifestly unjust.[44b]

A few recent cases have pointed in an opposite direction. Although no court has yet held it is erroneous, or prejudicial misconduct, for counsel to make an argument to the jury of the sort suggested, verdicts which have been reached on the basis of such arguments have been re-

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[43] Southern Pac. Co. v. Guthrie, 180 F. 2d 295, 303 (9th Cir. 1949).

[44] J. D. Wright & Son Truck Line v. Chandler, 231 S.W. 2d 786, 789 (Tex. Civ. App. 1950). A corollary technique which many lawyers think helpful to the jury is use of a blackboard for purposes of illustration during the examination of a witness or during the summation. 1 BELLI MODERN TRIALS §§ 128 *et seq.* (1954). The Second Circuit has said that this technique "would seem often potentially useful, as tending to clarify the issues." But it went on to say that it is in the discretion of the trial judge whether to permit its use. Mirabile v. New York Central R. Co., 230 F. 2d 498, 500 (2d Cir. 1956).

[44a] Drlik v. Imperial Oil Ltd., 141 F. Supp. 388, 394 (N. D. Ohio 1955).

[44b] Imperial Oil, Ltd. v. Drlik, 234 F. 2d 4, 11 (6th Cir. 1956).

duced or set aside, with sharp criticism of this technique of argument.

One such case is *Ahlstrom v. Minneapolis, St.P. & S.S.M. R. Co.*,[45] in which the senior author represented plaintiff. The facts were well stated by the court:

> The physical condition of plaintiff is doubtless very serious. Here we have a young man, 26 years of age at the time of trial, who has complete motor and sensory paralysis of the lower half of his body downward from a line just below the navel. His condition is such that he will be confined to a wheel chair for the rest of his life since he cannot use braces or crutches effectively, and, viewing the evidence thereon in the light most favorable to the verdict, he will need the services of a daytime attendant for the remainder of his life. Plaintiff has no control over his bladder and bowels and will be subject to public embarrassment and humiliation therefrom. Also, he has no prospect of a normal married life since he has lost all sexual powers. There is no hope for either natural or surgical improvement of his condition during the estimated 40.75 years remaining of his life.[46]

In closing argument it was suggested to the jury that $5 a day for pain, suffering, disability, embarrassment and humiliation might be an appropriate figure, and that this would amount to $91,670 for the plaintiff's life expectancy. This and the other elements of damage suggested to the jury totalled $295,589.05. The jury awarded $275,000, and the trial court denied a motion for a new trial on the ground of excessive damages.

The Minnesota Supreme Court was critical of the suggested award for pain and suffering.

> An award for pain, suffering, and disability on a per diem basis ignores the subjective basis of such damages. Unlike loss of earnings or the cost of a medical attendant, pain, suffering, and disability recoveries cannot be reduced to mathematical formulae, and on this theory they have been exempted from deductions for present worth. Each day of suffering is a part of a whole and will vary and generally decrease as time goes on. To permit a per diem evaluation of pain, suffering, and disability would plunge the already subjective determination into absurdity by demanding accurate mathematical computation of the present worth of an amount reached by guesswork. This is especially true in plaintiff's case where his loss of sensory perception will limit his pain and suffering to mental reactions of embarrassment, humiliation, and frustration based upon his personality traits and which should greatly decrease as time passes. Certainly no amount of money per day could compensate a person reduced to plaintiff's position, and to attempt such evaluation, as in this case, leads only to monstrous verdicts. In view of the

[45] 244 Minn. 1, 68 N.W. 2d 873 (1955).

[46] *Id.* at 24, 68 N.W. 2d at 887-8.

> other elements of damage, it is apparent that the jury awarded plaintiff something over $70,000 for pain, suffering, and disability. It is our opinion that such an award for this element of damage is not justified by the evidence presented in the instant case.[47]

The court, critical also of some of the other findings of the jury as to damages, ordered a remittitur of $100,000.

The same court, one week later, spoke out once more against this type of argument. In reducing a verdict, principally for the loss of an arm at the shoulder and a claimed back injury, from $170,000 to $105,000 the court said that the segmentation process of calculating damages on the basis of a fixed rate per day

> though illuminating, may be misleading. * * * Furthermore, pain and suffering which is subjective and which at its very worst usually varies from day to day cannot, with any finality, be estimated on a daily basis.[48]

The Federal District Court for Minnesota has had its say to the same effect.[49] And the Florida Supreme Court has hinted at possible doubts as to the propriety of this method of arguing. In a case in which it upheld an award of $187,000 for loss of a leg, the court noted that the jury had allowed precisely $5 per day for pain and suffering, as suggested by plaintiff's counsel. The court said that this method of calculating damages had not been challenged in the trial court, but

> if it be considered to be deceptive and to produce an excessive verdict, the court, in a proper case, and in the exercise of sound discretion to prevent injustice by excessive verdicts, may so find and order an appropriate remittitur.[50]

What is there about this method of argument which may be "misleading" or "deceptive"? Of course no sensible person would contend that pain or embarrassment are constants, or argue that the amount of these which Oscar Ahlstrom is going to suffer each day of his life is worth precisely $5. The usefulness of the per diem technique is as a reminder to the jury to consider the harmful effects of this accident upon him, not in terms of such a broad generality as his lifetime, but in terms of the 18,000 separate days in which he is going to have to sit in a wheelchair, in which he is going to require an attendant for the simplest functions, in which he is going to be deprived of the satisfactions he would have had absent defendant's negligence. Is this "deceptive" or "misleading"?

One of the best descriptions of how these non-economic factors are to be measured was set out by the Florida court in the case just considered:

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[47] *Id.* at 29-30, 68 N.W. 2d at 891.

[48] Hallada v. Great Northern Ry. Co., 244 Minn. 81, 98-9, 69 N.W. 2d 673, 687 (1955), *cert. denied* 350 U. S. 874 (1955).

[49] Becksted v. Skelly Oil Co., 131 F. Supp. 940, 943 (D. Minn. 1955).

[50] Braddock v. Seaboard Air Line R. Co., 80 So. 2d 662, 668 (Fla. 1955).

> Jurors know the nature of pain, embarrassment and inconvenience and they also know the nature of money. Their problem of equating the two to afford reasonable and just compensation calls for a high order of human judgment, and the law has provided no better yardstick for their guidance than their enlightened conscience.[51]

In the performance of that difficult task, the jury should be given all the help possible. We believe that emphasis on the daily aspects of these consequences of the injury, and a reminder that even seemingly large sums become quite small when they are divided over a long enough period, are helpful to juries and should be considered proper.

Death actions

Where the employee is killed, rather than merely maimed, the uniform federal rule, which must be followed no matter what the local wrongful death act provides,[52] is that his administrator, suing for the benefit of the next of kin, is entitled to recover such damages

> as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries.[53]

These include both the estimated value of the portion of his earnings which he can reasonably have been expected to give to his family, usually referred to as "contributions," and certain less tangible items such as care and training of his children, and services around the home.[54]. If he survived the accident for some time before dying, an award for conscious pain and suffering is also proper.[55] No allowance can be made for the anguish and grief of his relatives,[56] nor for funeral expenses.[57]

Far and away the major element of recovery is the "contributions." The measure of damages in a FELA death action is said to be based on Lord Campbell's Act, the English statute which provided a model for many state wrongful death acts.[58] Among the states there is some confusion in construing such statutes.[59] Many states allow recovery of "net earnings," which is the expected earnings of the deceased less his personal living expenses. This sum represents both what he would have given to his family and what he would have accumulated. It is very

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[51] *Ibid.*

[52] Chesapeake & O. R. Co. v. Kelly, 241 U. S. 485, 491 (1916).

[53] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 70 (1913).

[54] *Id.* at 71; Norfolk & W. Ry. Co. v. Holbrook, 235 U. S. 625 (1915).

[55] St. Louis, I.M. & S. Ry. Co. v. Craft, 237 U. S. 648 (1915).

[56] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59 (1913); McCormick, Damages 347-9 (1935).

[57] Heffner v. Pennsylvania R. Co., 81 F. 2d 28 (2d Cir. 1936); Philadelphia & R. Ry. Co. v. Maryland, 239 Fed. 1 (3d Cir. 1917), *cert. denied* 245 U. S. 671 (1918); Parga v. Pacific Electric Ry. Co., 103 Cal. App. 2d 840, 230 P. 2d 364 (1951).

[58] *See* Dow v. Carnegie-Illinois Steel Corp., 165 F. 2d 777, 779 (3d Cir. 1948).

[59] McCormick, Damages 339-345 (1935).

clear that the more restrictive standard of "contributions" applies in a FELA action, that the next of kin are only entitled to recover for the pecuniary benefit they have lost, and that

> the "benefit" is the amount which the jury finds the dead man would have given to his wife and other dependents had he lived.[60]

Thus in an early case the Supreme Court held it was error to instruct the jury that they could compute damages by simply deducting his living expenses from his expected income.[61] The instruction would have allowed the jury to use the "net earnings" measure.

But while the distinction is an important one in other kinds of cases, and even in FELA actions care must be used to employ the right formula, in fact in most such actions the difference is purely verbal. The average railroad worker for whose death recovery is sought under FELA is a man of moderate means. He has no excess income to put into savings. Instead his contributions to his family are closely related to his earning capacity. In most railroad households, the paycheck is turned over to the worker's wife, and she gives him a small allowance for his own living expenses. The amount given to the wife, less the allowance for the worker, represents the "contributions."

This has been reflected in many cases. In one case the court described the evidence as to "contributions" as follows:

> With the exception of deductions under the Railroad Retirement Act of 1937, 45 U.S.C. § 288a *et seq.*, and about $3 per month for spending, he contributed all of his earnings to his wife. He expended very little money for clothes and other living expenses.[62]

Again another court relied for its computations on evidence that from his earnings of $2100 a year, decedent

> retained for his own personal needs approximately $150 a year and * * * the balance went into the maintenance of the household.[63]

One dead employee was found to have contributed $170 a month, out of earnings of $210, to his family.[64] In another case decedent was found to have given

> all of his earnings to his wife for the support of his family, consisting of three children, except such sums as were necessary for his travel expense.[65]

In a similar case, where the evidence showed earnings of $4200 a year

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[60] Dow v. Carnegie-Illinois Steel Corp., 165 F. 2d 777, 779 (3d Cir. 1948).

[61] Kansas City Southern Ry. Co. v. Leslie, 238 U. S. 599 (1915).

[62] Giles v. Chicago G. W. Ry. Co., 72 F. Supp. 493, 495 (D. Minn. 1947).

[63] Sherman v. Southern Pac. Co., 34 Cal. App. 2d 490, 499. 93 P. 2d 812, 818 (1939).

[64] Sibert v. Litchfield & M. Ry. Co., 159 S. W. 2d 612, 618-9 (Mo. 1941).

[65] O'Brien v. Chicago & N. W. Ry. Co., 329 Ill. App. 382, 402, 68 N. E. 2d 638, 648 (1946).

and expenses of $900 to $1000 applicable only to decedent while away on the road, the railroad itself, in attacking the verdict as excessive, assumed that contributions could be computed on a basis of $3000 a year.[66]

Actually it is not only railroad workers who give their wives their paycheck—as many readers of this *Journal* may know from experience. Evidence in an airplane crash case showed that a young man was making $9000 a year as superintendent of the Easter Egg Coloring Department of a candy factory.

> All of the decedent's income, with the exception of $30 a week which he reserved for his own immediate needs and purposes, was required and used for the support of his family.[67]

The court deducted this $30 a week and the amount of his income taxes from his earnings, and held that his "contributions" were $6500 a year.

The case just discussed is the only case we have found which even hints that federal income tax is a factor to be considered in a death action, and it contains no discussion of the point. There is a square holding that taxation is not a proper factor in calculating death damages by the Ohio Court of Appeals[68], and a strong and reasoned argument to that effect by the Illinois Supreme Court.[69] Certainly the reasons which have moved many courts to hold that federal taxes should not be considered in injuries actions[70] retain much force in death actions. Taxation is still a matter between the taxpayer and the government, which should be of no concern to the tortfeasor. And the effect of taxation cannot readily be predicted by a jury: tax rates changes, and prolific railroad workers are constantly increasing the number of their exemptions. At the same time, we recognize that in death cases it can be argued that the workman could not contribute to his family the sum he pays as tax to the government.

In the present state of the authorities, to the extent that there is a rule of law, it is that taxes need not be deducted. Nevertheless, so long as the question remains at all unsettled, we have preferred in our own cases to deduct taxes in calculating the amount which we ask the jury to award.[71] It seems to us tactically wise, even if not legally compelled, to ask for less than we might be entitled to, and give the railroad the benefit of every doubtful question, in order that we may argue more

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[66] Miller v. Southern Pac. Co., 117 Cal. App. 2d 492, 256 P. 2d 603 (1953), *cert. denied* 346 U. S. 909 (1953).

[67] DeVito v. United Air Lines, 98 F. Supp. 88, 98 (S.D.N.Y. 1951).

[68] Smith v. Pennsylvania R. Co., 47 Ohio App. 49, 99 N.E. 2d 501 (1950).

[69] Hall v. Chicago & N.W. Ry. Co., 5 Ill. 2d 135, 125 N.E. 2d 77 (1955), held applicable to death actions in Allendorf v. Elgin, J. & E. R. Co., 8 Ill. 2d 164, 133 N. E. 2d 288, 296 (1956). *Accord:* Wawryszyn v. Illinois Cent. R. Co. 10 Ill. App. 2d 394, 135 N. E. 2d 154 (1956).

[70] See pp. 435-6 above.

[71] *E.g.,* Starck v. Chicago & N. W. Ry. Co., 4 Ill. 2d 611, 123 N.E. 2d 826 (1954); Allendorf v. Elgin J. & E. R. Co., 8 Ill. 2d 164, 133 N. E. 2nd 288, 296 (1956).

forcefully for the smaller amount to which the widow and children are certainly entitled.[72]

Even though the recoverable damages are thus tied closely to decedent's earnings, something more than proof of earnings is necessary for a verdict. Where there is no proof as to how much of his earnings he gave his next of kin, the jury has no basis on which to compute "contributions," and cannot properly make any award for this important element of damages.[73]

There has lately been an attempt by railroad lawyers to attack proof of contributions based on the amount turned over to the wife. In these cases the evidence shows, as is usual, that from the amount given her the wife paid all the household expenses. Suppose the proof is that decedent gave his wife $300 a month, and that she used this to maintain a home for him and for their two children. Defense counsel would argue that the actual contributions are only $225, since decedent enjoyed one-fourth of the benefits purchased with the money given his wife.[74]

No one would deny that defendant is entitled to make such an argument to the jury. If the jury believes the argument, it could award three-fourths of the sum testified to by plaintiff's actuary as the present worth of the expected contributions. Indeed defendant, in cross-examining the actuary, can prepare for such an argument by asking what the present worth of $225 a month would be. At the same time, plaintiff has the right to claim that the entire $300 was a contribution to the family, and the jury might very well so find.[75] It could rely on its own experience

[72] Thus in the *Allendorf* case, *supra,* the unduly favorable calculation which deducted taxes was held by the court to help offset any prejudicial effect which might otherwise have resulted from the admission of certain other evidence the court thought erroneous.

[73] Nashville, C. & St. L. Ry. v. Anderson, 134 Tenn. 666, 185 S.W. 677 (1916); Parga v. Pacific Electric Ry. Co., 103 Cal. App. 2d 840, 230 P. 2d 364 (1951); *cf.* Kansas City Southern Ry. Co. v. Leslie, 238 U. S. 599 (1915). But *cf.* Kreitzer v. Southern Pac. Co., 38 Cal. App. 654, 177 Pac. 477 (1918).

[74] In Atlantic Coast Line R. Co. v. McMoy, 261 Ala. 66, 73 So. 2d 85 (1954), the husband turned over $250 monthly to his wife. The court said that part of this went for rent, groceries, electricity, etc., and that the husband ate and lived at home and participated in these contributions. Thus it concluded that $180 a month "appears reasonable" as the amount actually contributed to the wife. To similar effect is Louisville & N. R. Co. v. Young's Adm'x, 253 S.W. 2d 585 (Ky. 1952). It should be noted that neither of these cases contains any discussion of the soundness of such an assumption. And the cases cited at notes 62-67 above are inferentially to the contrary.

[75] The analysis suggested in the text was accepted in a careful opinion of the Illinois Supreme Court in Allendorf v. Elgin, J. & E. R. Co., 8 Ill. 2d 164, 133 N.E. 2d 288 (1956). An earlier opinion in that case, superseded on rehearing, was even more specific: "It may well be that Allendorf used the family house and enjoyed a measure of the family conveniences. We cannot say, however, that by his so doing, these benefits to other members of the family were proportionately reduced." See also Wright, *A Primer of Practical Evidence,* 40 MINN. L. REV. 635, 654-5 (1956).

as to the truth of the adage that two can live as cheaply as one, and reject the sophisticated arguments offered by defense counsel. Thus a large part of the family living expense goes for housing. Decedent did not provide his wife and children with three-quarters of a house; he provided them with a house. This house is just as expensive to pay for and maintain with the widow sleeping by herself in the master bedroom as it was when she shared the room with her husband. Suppose, for example, that the total housing cost before the accident was $100. The railroads would argue that the dependents will be made whole if they are given $75. Justice Holmes has reminded us that "judges need not be more naive than other men." Neither do jurors.

We showed earlier that in a suit for injuries the jury may consider the possibility that plaintiff's earnings would have increased, and may award damages for impairment of earning capacity based on a figure larger than the earnings he enjoyed before the accident.[76] The same principle applies in a death action. The jury may decide that a young man's earnings would have increased and that his contributions would have risen proportionately.[77] In making this evaluation of the decedent's prospects at the time of his death, the jury may give weight to such specific factors as that he had already been classified as an engineer by the railroad company, though still working as a fireman,[78] or that a seaman "was ambitious to improve his status and increase his annual earnings" and was already taking steps toward becoming a licensed officer.[79]

The Supreme Court ruled in an early leading case that the pecuniary loss to the next of kin does not turn on any legal liability of the decedent to support them; they must show "some reasonable expectation of pecuniary assistance or support."[80] This necessarily gives relevance to the degree of domestic bliss which prevailed in the home now rent by death. Defendant can introduce evidence that husband and wife had separated prior to his death and had not been reconciled; such evidence does not

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[76] See pp. 433-5 above.

[77] "* * * (T)hey could have based their award on other factors, such as the prospect that the son would make increased contributions in the future from larger earnings and the decreased purchasing power of the dollar." Renaldi v. New York, N. H. & H. R. Co., 230 F. 2d 841, 845 (2d Cir. 1956). "Competent statistical data supports a common sense observation that a man so young with so large an income is likely to continue to advance and to enjoy a substantially greater income in the future. See Fig. 4 in DUBLIN & LOTKA, THE MONEY VALUE OF A MAN, 65 (Rev. ed. 1946)." Allendorf v. Elgin, J. & E. R. Co., 8 Ill. 2d 164, 133 N.E. 2d 288, 296 (1956).

Accord: Beattie v. Monongahela R. Co., 122 F. Supp. 803 (W. D. Pa. 1954); McKee v. Jamestown Baking Co., 101 F. Supp. 794, 796 (W.D. Pa. 1952). *But of.* DeVito v. United Air Lines, 98 F. Supp. 88 (E. D. N. Y. 1951).

[78] O'Brien v. Chicago & N. W. Ry. Co., 329 Ill. App. 382, 68 N. E. 2d 638 (1946).

[79] Naylor v. Isthmian S. S. Co., 94 F. Supp. 422, 424 (S.D.N.Y. 1950), *rev'd on other grounds,* 187 F. 2d 538 (2d Cir. 1951).

[80] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 70 (1913).

defeat recovery but leaves it for the jury to decide how much decedent would have been likely to have contributed to his spouse.[81] In one recent case the widow had been deserted by her husband nearly 20 years before, she had neither seen him nor received any support from him in the interim, and he had "remarried" and had five children in the interval by his putative wife. An award to the widow of $4500 for contributions and $500 for decedent's conscious pain and suffering was affirmed.[82]

Evidence of domestic unhappiness which is too remote, and likely to be merely prejudicial, will not be received. Thus it is safe to surmise that defendant would not be allowed to introduce evidence that husband and wife had frequent loud fights, or that he was frequently seen with another woman, so long as decedent was still living with his wife and supporting her at the time of his death. And admission of evidence that the wife had gotten a judicial separation, and the husband had sued unsuccessfully for divorce, three years before was held to be reversible error where the wife had returned to her husband and the two had lived happily for the seven months prior to his death. The court said:

> To hold that an unsuccessful action for absolute divorce, begun and terminated several years before a complete reconciliation of a husband and a wife, would serve to demonstrate a disposition on the part of the husband to withhold funds which he might otherwise have given his wife if he had lived is to put speculation on speculation, effecting a mere chimera of evidence.[83]

What the widow does after the death is her own business, not defendant's. If she chooses to find solace for her grief on the shoulder of another man, this is her privilege, and her damages are not diminished thereby. She had a reasonable expectation of support from her first husband at the time of his death, and is entitled to recover for the destruction of that expectation, even though she later finds someone else to support her . Plaintiff is entitled to an instruction that the jury is not to consider the widow's remarriage;[84] one wonders, indeed, if evidence of the remarriage should not be excluded as irrelevant.

Suppose that the verdict is larger than the highest amount which the jury could properly have found as the present worth of the expected contributions. Is the verdict then excessive? Clearly the answer must normally be "No."

This has been strikingly illustrated by the United States Supreme Court in its most recent decision as to damages under FELA.

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[81] McGlethan v. Pennsylvania R. Co., 170 F. 2d 121 (3d Cir. 1948).

[82] Civil v. Waterman S. S. Corp., 217 F. 2d 94 (2d Cir. 1954), criticized Comm., *The Deserted Wife's Loss from the Death of Her Husband*, 7 STAN. L. REV. 409 (1955).

[83] Dow v. Carnegie-Illinois Steel Corp., 165 F. 2d 777, 780 (3d Cir. 1948).

[84] Sivert v. Pennsylvania R. Co., 197 F. 2d 371 (7th Cir. 1952); Baltimore Transit Co. v. State for Use of Castranda, 194 Md. 421, 71 A. 2d 442 (1950) (non-FELA case); Anno., 30 A.L.R. 121.

Suit was brought against the Southern Railway for the death of one Neese, an unmarried 22 year old man whose average take-home pay had been $2200. Neese had lived at home with his parents, and had given them part, but a good deal less than all, of his earnings. The jury awarded $60,000, and the trial court required a remittitur of $10,000. On defendant's appeal from the judgment for $50,000, the Court of Appeals held that the amount was so excessive as to be "monstrous" and ordered a new trial as to damages.[85] The court pointed out that even on what it termed the "fantastic" assumption that Neese would have given his parents $2500 a year for the rest of their lives, the present worth of this sum would be only $39,000, substantially less than the judgment in their favor.

The Supreme Court granted certiorari in order to decide whether an appellate court has the power to review verdicts on the ground that they are excessive, but it disposed of the case without reaching the question of power.

> * * *[A]s we view the evidence we think that the action of the trial court was not without support in the record, and accordingly that its action should not have been disturbed by the Court of Appeals.[86]

It would be hard to find more convincing proof that death damages cannot be totted up on an adding machine, and that the jury is free to weigh imponderables in arriving at its verdict.

The same point is illustrated by a state court case, where a verdict of $80,000 was held not excessive even on the assumption that $60,000 covered the contributions and the pain and suffering for the 20 minutes decedent lived after his injuries. The court said that the other $20,000 could easily be accounted for as the jury's award to decedent's children to compensate them for the loss of the care and guidance of a father.

> The difference, $20,000, readily could be accounted for as the award to Miller's children for the loss of their father's care, attention, instruction, training advice and guidance; not an excessive amount for four children ranging from 6 to 12 years, bereft of a father who loved them, took a tender interest in them, and possessed the personal qualifications this father exhibited, to lead and guide them throughout the years of their development into the full flower of manhood and womanhood.[87]

This element of recovery was authorized by an early Supreme Court decision.[88] It is only proper, however, where there is testimony concern-

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[85] Southern Ry. v. Neese, 216 F. 2d 772 (4th Cir. 1954)

[86] Neese v. Southern Ry. Co., 350 U. S. 77 (1955).

[87] Miller v. Southern Pac. Co., 117 Cal. App. 2d 492, 510, 256 P. 2d 603, 613 (1953), *cert. denied* 346 U. S. 909 (1953).

[88] Norfolk & W. Ry. Co. v. Holbrook, 235 U. S. 625 (1915). A substantial verdict in a non-FELA case was affirmed in Dahl v. North American Creameries, 61 N.W. 2d 916, 925 (N. D. 1953), with the following statement: "The plaintiff had a right to expect from her father not only support by the way of nurture,

ing the personal qualities of the deceased and the interest which he took in his family.[89] Such testimony is not hard to come by. Witnesses can be counted upon to rely on the maxim, *de mortuis nil nisi bonum.* But the testimony must not be overlooked in the press of more sharply contested issues. A few sentences from the widow about what a fine person her husband was, and how his greatest joy in life was to come home from the switchyard and help his children with their problems, can justify a good many thousands of dollars in the verdict. It is not necessary to prove any particular dollars-and-cents value for the lost care and guidance, any more than it would be necessary to prove the value of pain and suffering or of inconvenience and annoyance when these are elements of damages. The jury should assess the value of such loss in the exercise of its best judgment based on the facts of the particular case.[90]

A second intangible element for which recovery can be had is services which the deceased husband would have performed about the home.[91] Again there must be evidence that such services were performed in the past in order to justify an instruction that the jury should consider the value of such services.[92] Did the husband cut the grass, put up the storm windows, or help with the marketing? Did he have a garden in which he grew food for the family table? Services such as these have a pecuniary value, as the widow will find when she has to pay someone to do them for her.[93] She should be asked about such services, and the jury instructed to consider them in its award.

In the last few years there has been some suggestion[94] that American jurisdictions, following the English example,[95] should allow damages for destruction of the decedent's psychic interest in the continuation of his own life. We view this proposal with considerable skepticism. The English experience with such an element of recovery has been less than

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clothes and housing but also the care and protection of a father. She is deprived of that. These are services that cannot be supplied as well by anyone other than the father. Every young girl now has the right to expect her father to provide her special training along whatever line of work she plans to enter. All these services are certainly of pecuniary value to a growing child. The presumption is that the plaintiff would have those valuable services from her father during her growth and development and even after that as she might need them during her life expectancy."

[89] Thus in the absence of such testimony, no recovery was allowed for this element in Louisville & N. R. Co. v. Young's Adm'x, 253 S. W. 2d 585, 589 (Ky. 1952).

[90] Mobile & O. R. Co. v. Williams, 226 Ala. 541, 147 So. 819 (1933), *cert. denied* 290 U. S. 655 (1933).

[91] *E.g.,* Alabama G. S. R. Co. v. Cornett, 214 Ala. 23, 106 So. 242 (1925).

[92] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 39 (1913).

[93] Ward v. Denver & R. G. W. R. Co., 96 Utah 564, 591, 85 P. 2d 837, 849 (1939).

[94] *E.g.,* Smith, *Psychic Interest in Continuation of One's own Life: Legal Recognition and Protection,* 98 U. OF PA. L. REV. 781 (1950).

[95] The leading case is Flint v. Lovell, [1935] 1 K. B. 354 (C.A.),

happy.[96] We agree that the decedent has been harmed in this respect, but fail to see any compelling reason for giving his next of kin a windfall to compensate for such a uniquely personal loss to the decedent. This is a far different matter from the award for future pain and suffering to an injured person, where the plaintiff receives money as compensation for a non-economic loss which he himself will experience. And the insistence that only pecuniary losses are compensable in a FELA death action makes it highly unlikely that recovery for destruction of the psychic interest in the continuation of one's own life will be held permissible in this kind of litigation.[97]

The only exception to the restriction of FELA death actions to pecuniary losses is the specific statutory provision allowing damages for conscious pain and suffering between the injury and death.[98] It is proper to sue in one action for the benefits lost to the next of kin, under the wrongful death section of the statute, and for the conscious pain and suffering, under the survival section.[99] It is not necessary that the jury segregate the sums allowed under the two sections,[100] though frequently such a segregation is made. In the federal courts and most, if not all states, defendant can request that special interrogatories be submitted to the jury asking how much is being allowed for pain and suffering and how much is being allowed for the loss of the next of kin.[101] It is discretionary with the trial court, in most jurisdictions, whether to allow such special interrogatories. Plaintiffs seldom would have any desire for such special interrogatories. The award for pain and suffering is measured by no fixed standard, and the jury has a wide range in which to set the amount. Thus in one case, involving the death of a young seaman, the jury allowed $75,000 for the death and $40,000 for conscious pain

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[96] See *e.g.*, the speeches in Bonham v. Gambling, [1941] A.C. 157. Indeed Dr. Smith's thoughtful and provocative article, note 94 *supra*, comes near to conceding as much, at pp. 823-4.

[97] It has been twice rejected by the Third Circuit. Hickman v. Taylor, 170 F. 2d 327 (3d Cir. 1948), *cert. denied* 336 U. S. 906 (1949); Holliday v. Pacific Atlantic S. S. Co., 212 F. 2d 206 (3d Cir. 1954). We note, however, recent judicial recognition of a kind of damages which springs from the same philosophic source as the psychic interest in the continuation of one's life. In Fox v. Fox, 296 P. 2d 252 (Wyo. 1956), a common law injuries action, the court held that a married woman, without any earnings, might nevertheless recover a substantial amount for "loss or impairment of power and capacity of work and mobility, which is the right to be a normal human being." *Id.* at 262. The court was at pains to say that this was separate and distinct from any right to recover for impairment of earning capacity.

[98] 45 U.S.C. §59.

[99] St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648 (1915) ($5000 for 30 minutes suffering affirmed).

[100] Kansas City Southern Ry. Co. v. Leslie, 238 U. S. 599 (1915).

[101] *E.g.*, Fed. R.C.P. 49. *Cf.* Central Vt. R. Co. v. White, 238 U. S. 507, 515 (1915).

and suffering during the ten hours the seaman survived his injuries. The trial court refused to set this aside as excessive:

> I can find neither intemperance, passion, partiality, nor corruption on the part of the jury. It worked earnestly and intently on the case. It had the right to consider the present purchasing power of the dollar. It had no yardstick, save its own collective conscience. * * * The pain inflicted on an individual which is caused by the wrongdoing of another is no less to a poor man than to a millionaire. It is most difficult to assess. In the absence of intemperance, passion, partiality, or corruption—and there is none evident in this case—I am not one to say that terrific pain inflicted on a seaman for ten hours is not worth $40,000—when a jury of free men and women calmly, carefully and deliberately so decide.[102]

When the damages for conscious pain and suffering are lumped with the damages for death, the flexibility necessarily present in the former makes it much harder for a court to determine that the total amount is improper. And this can sometimes work the other way also. In one case in which the senior author represented the plaintiff, the jury awarded $65,000 for death and $35,000 for four day's pain and suffering. A verdict of $100,000 for both elements of recovery would have been well justified under the evidence. But the trial court decided that $35,000 was too much for pain and suffering, and required a remittitur of $15,000 of this amount.

II. Period of Loss

The basic amount of loss in a FELA action is calculated in the manner we have indicated above. It is also necessary for the jury to determine the period over which this loss will be suffered and for which damages are recoverable.

Damages in a death action are awarded for the number of years the next of kin could reasonably have expected to receive benefits from the deceased. This normally will be the period the deceased probably would have lived,[103] or the period the beneficiaries themselves can reasonably expect to live, whichever is shorter.[104] The one limitation on this rule is that minor children are normally able to expect support only during the period of their minority, and defendant is entitled to an instruction that damages awarded for loss of benefits of minor children are to be so limited.[105]

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[102] Naylor v. Isthmian S. S. Co., 94 F. Supp. 422, 424 (S. D. N. Y. 1950), *rev'd on other grounds,* 187 F. 2d 538 (2d Cir. 1951). Consider also New York N. H. & H. R. Co. v. Zermani, 200 F. 2d 240 (1st Cir. 1952), *cert. denied* 345 U. S. 917 (1953), affirming an award of $116,500 for the death of a 39 year old brakeman, and an additional $25,000 for six days suffering before he died.

[103] McCormick, Damages 346 (1935).

[104] *E.g.,* Atlantic Coast Line R. Co. v. McMoy, 261 Ala. 66, 73 So. 2d 85 (1954).

[105] Thompson v. Camp, 163 F. 2d 396 (6th Cir. 1947), *cert. denied* 333 U. S. 831 (1948); Chicago, B. & Q. R. Co. v. Kelley, 74 F. 2d 80 (8th Cir. 1934). This

Suppose that the employee, with an expectancy of 10 years, had been giving $300 a month for the support of his wife and a 20 year old child. Should the jury award the present worth of $300 for ten years? Or should it, as defendants have recently been contending,[106] assume that a part of the contributions would cease in a year, when the child turned 21, and thus award perhaps $200 a month for ten years, and $100 a month for one year? There are no clear-cut decisions on the point. We believe that it is for the jury to decide what the decedent would probably have done with the extra $100 a month when his child became of age. If the jury believes that the amount would then have gone into savings, or would have been spent by the employee on himself, it should limit the recovery in the manner suggested. But if the jury determines that, as in most households, the wife would continue to take the entire paycheck and spend more on herself, it should allow recovery for the full amount. No evidence can show what will happen in a contingency which has not yet come to pass. The jury's common sense must provide the rule, guided by a careful instruction that recovery for support of children is to be limited to their minority.

In an injuries case, damages for impairment of earning capacity are measured by the length of time the injured person would have lived had he not been injured, while damages for future medical expenses, and for pain and the other non-economic elements of recovery, should be based on the period the plaintiff can expect to live in his injured condition.[107]

The recovery in all cases is for the destruction of reasonable expectations as of the day of trial, rather than for actual loss. Thus a jury may award damages to an injured plaintiff on the assumption that he will live 40 years. If he drops dead the next day, the verdict will stand.[108] By the same token in a death action where the widow is the sole beneficiary, her death immediately after trial will not vitiate a verdict based on a longer expectation as to her life. But as to events which happen before the trial, the jury must rely on certainties, rather than possibilities. The Supreme Court has held that the death of the sole beneficiary before trial does not bar recovery, but damages are to be for the period from the death of the employee until the death of the beneficiary, and not for

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rule is recognized, but omission of a specific instruction to this effect found not to be prejudicial error, in O'Donnell v. Elgin, J. & E. Ry. Co., 193 F. 2d 348, 355 (7th Cir. 1951), *cert. denied* 343 U. S. 956 (1952), and Horton v. Seaboard Air Line Ry. Co., 175 N. C. 472, 95 S. E. 883 (1918), *cert. denied* 251 U. S. 566 (1919).

[106] *E.g.*, Miller v. Southern Pac. Co., 117 Cal. App. 2d 492, 256 P. 2d 603 (1953), *cert. denied* 346 U. S. 909 (1953).

[107] Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643 (1952); McCORMICK, DAMAGES 303-4 (1935). *But cf.* Comment, *The Measure of Damages for a Shortened Life*, 22 U. OF CHI. L. REV. 505 (1955).

[108] Dempsey v. Thompson, 363 Mo. 339, 251 S.W. 2d 42 (1952); Rouse v. New York, C. & St. L. R. Co., 349 Ill. App. 139, 110 N. E. 2d 266 (1953).

any period thereafter.[109] Thus presumably if an injured plaintiff died before trial from a cause not connected with the injury, damages would be limited to his actual lifetime.[110]

There has lately been some suggestion that damages for destruction of the economic value of a man, whether by way of impairment of earning capacity in an injuries suit or for loss of contributions in a death action, should be permitted only for his "work expectancy" rather than for his "life expectancy." The earning power of many people does diminish over the years, and this is surely a factor which a jury can and should take into account.[111] As one court put it, they should make

> due allowance * * * for the decline of earning power because of the abatement of mental and physical vigor consequent upon the passage of time.[112]

The approach just indicated puts this matter in its proper light, as a part of the problem of valuing the earning capacity which has been impaired, rather than as relevant to the period for which recovery should be calculated. Defendants have sought more; they have asked for instructions limiting recovery to "work expectancy" and have challenged the admission of actuarial testimony based on the full life expectancy. Analytically this is surely unsound. Plaintiff's right is to recover for his impaired earning capacity for all of his life, though in his last years this capacity may be very small and should be so valued. Nor does the fact that in today's society welfare funds and social security have made it possible for many people to retire while still vigorous diminish recovery. An unemployed man has an earning capacity entitled to protection. So does the man who has voluntarily retired.[113]

No case has accepted this proposed limitation to "work expectancy." The only decision even approaching it is one in which the court, in measuring the verdict for excessiveness, said:

> There is also controversy as to whether loss of earnings can be said to relate to a period after Guthrie would have reached age 70, when the rules of his employer would require his retirement. We think the prospect of a continuance of employment

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[109] Van Beeck v. Sabine Towing Co., 300 U. S. 342, 347 (1937).

[110] We have found no case on this point. The *Van Beeck* case, *supra* note 109, implies clearly that there could be no recovery for more than the damages suffered during the actual lifetime. That recovery is possible for this much seems necessarily to follow from the literal language of 45 U. S. C. §59, which provides that the claim the injured person would have had survives in the event of his death.

[111] Western & A. R. R. v. Burnett, 79 Ga. App. 530, 541, 54 S. E. 2d 357, 366 (1949); *cf.* Gill v. United States, 85 F. Supp. 717, 721 (S.D.N.Y. 1949), *aff'd* 184 F2d 49 (2d Cir. 1950) (case tried to court).

[112] Loftin v. Wilson, 67 So. 2d 185, 188 (Fla. 1953).

[113] The approach we support, allowing recovery for the full life expectancy but recognizing that earning capacity may diminish with age, is seemingly adopted in Imperial Oil, Ltd. v. Drlik, 234 F. 2d 4, 12 (6th Cir. 1956).

> after 70, and after compulsory retirement from employment by the Southern Pacific, too remote to enter calculation here.[114]

This is certainly far from a holding that recovery must be limited to age 70. It is merely a statement that on the evidence before it the jury probably found the present worth of the earning capacity after age 70 to be so insignificant as not to justify inclusion. The other cases commonly cited in support of "work expectancy" give even less support to such a doctrine. The "work expectancy" contention was advanced in the notorious case of *Wetherbee v. Elgin, J. & E. Ry. Co.*,[115] but neither commented upon nor adopted by the court. In another case the court noted that defendant had presented such an argument but put no further reliance on it.[116] The only case where a court has seriously discussed "work expectancy" is a case tried by the senior author, where plaintiff had voluntarily limited his proof to age 65 rather than for the full life expectancy. Despite this, defendant argued that "work expectancy" should be considered. The court said that defendant's contention

> rests upon a misunderstanding. Defendant urges that the court erred in permitting the actuary to calculate expected lost benefits upon the basis of life expectancy rather than work expectancy. The record conclusively shows that the actuary's figures were calculated on decedent's retirement at the age of 65.[117]

As that case indicates, we believe that it is frequently sound, both ethically and tactically, to ask for less than the maximum the jury might properly award, rather than to push demands to—and perhaps through inadvertence beyond—the limit. If the employee probably would have retired at 65, and his earning capacity thereafter would be insubstantial, it is far better to confine the proof to age 65, and insist on an award for the amount which is unquestionably due.[118]

But where counsel determines to demand damages for the full expectancy, a multitude of cases support such a choice. The clearest holding is a case where the injured person had an expectancy of living until 73, and the actuarial testimony was based on his earning capacity to that age. The propriety of this testimony was supported by evidence introduced on behalf of plaintiff that the defendant had in its employ one engineer 75, one 74, and two well over 65. The appellate court held it was not error to prove damages to age 73.[119]

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[114] Southern Pac. Co. v. Guthrie, 180 F. 2d 295, 303 (9th Cir. 1949).

[115] 191 F. 2d 302, 310-1 (7th Cir. 1951), *cert. denied* 346 U. S. 867 (1953).

[116] Holliday v. Pacific Atlantic S. S. Co., 117 F. Supp. 729, 734 (D. Del. 1953).

[117] Starck v. Chicago & N. W. Ry. Co., 4 Ill. 2d 611, 624. 123 N. E. 2d 826, 834 (1954).

[118] *E.g.*, Allendorf v. Elgin, J. & E. R. Co., 8 Ill. 2d 164, 133 N. E. 2d 288, 296-7 (1956). Allied Van Lines, Inc. v. Parsons, 80 Ariz. 88, 293 P. 2d 420, 437 (1956) (non-FELA case).

[119] Rouse v. New York, C. & St. L. R. Co., 349 Ill. App. 139, 110 N. E. 2d 266 (1953). See also the dictum in Allendorf v. Elgin, J. & E. R. Co., 8 Ill. 2d 164,

In order to prove the reasonable expectancy of the injured person or his beneficiaries, it is customary to use mortality tables,[120] and they are admissible in a FELA action regardless of any state rule to the contrary.[121] Plaintiff will wish to use the latest and most authoritative tables, and is entitled to do so. The well-known American Experience Table is based on data almost a century old, and is hardly a reliable guide today. Even worse is to find courts still using the discredited Carlisle and Northampton tables, based on inadequate data of English lives at the beginning of the 19th century.[122] These bear so little relation to expectancies of Americans in the last half of the 20th century as to be completely valueless. The tables which merit admission today are the Commissioners' Standard Ordinary Table, created from 1941 data and used for the calculation of insurance premiums, and the even later and better United States Life Tables, put out by the United States Government.[123]

Mortality tables are admissible under a well-known exception to the hearsay rule.[124] Where a foundation seems desirable, it need not be provided by an actuary; a certified public accountant or other person famil-

133 N.E. 2d 288, 296 (1956): "There are innumerable cases indicating that recovery is permissible for the full life expectancy even though the deceased might have retired at an earlier age. New York, New Haven & Hartford Railroad Co. v. Zermani, 200 F. 2d 240; Fritz v. Pennsylvania Railroad Co., 185 F. 2d 31; Atlantic Coast Line Railroad Co. v. McMoy, 261 Ala. 66, 73 So. 2d 85; Louisville & Nashville Railroad Co. v. Young, 253 S.W. 2d 585; Sibert v. Litchfield & M. Railway Co., 159 S.W. 2d 612, 618. * * * Furthermore, the actuary's testimony was based upon future net earnings until the time decedent would have become 65 years of age. According to one mortality table Allendorf's expectancy was 68.21 years. The age of 65 was used because it is the normal age for railroad retirement. Thus plaintiffs unnecessarily limited their recovery by asking for computation only until age 65." In addition to the cases cited by the court, see: Schlatter v. McCarthy, 113 Utah 543, 196 P. 2d 968 (1948), where the verdict was, to the penny, the exact value of an annuity for the full expectancy of a 61 year old man; Lovejoy v. Monongahela Connecting R. Co., 137 F. Supp. 42, 46 (W. D. Pa. 1955) (court calculates wage loss for 25 years for 47 year old man); Illinois Cent. R. Co. v. Coussens, 77 So. 2d 818, 824 (Miss. 1955) (age 54, expectancy 18.48 years); Miller v. Southern Pac. Co., 117 Cal. App. 2d 492, 256 P. 2d 603 (1953), *cert. denied* 346 U. S. 909 (1953) (age 37, expectancy 30.35 years).

120 Vicksbrg & M. R. Co. v. Putnam, 118 U. S. 545, (1886).

121 Chesapeake & O. Ry. Co. v. Kelly, 241 U. S. 485, 491 (1916).

122 See generally *Life Tables*, 14 ENCY. BRIT. 53 (14th ed. 1939); WRIGHT, THE CONSTRUCTION AND GRADUATION OF MORTALITY TABLES 3 (1946). The Carlisle Table has been relied on in, *e.g.*, Louisville & N. R. Co. v. Stephens, 298 Ky. 328, 344, 182 S.W. 2d 447, 456-7 (1944); Western & A. R. R. v. Burnett, 79 Ga. App. 530, 544, 5 S. E. 2d 357, 368 (1949).

123 The United States Life Table is considered, and held admissible, in Bennett v. Denver & R.G.W.R. Co., 117 Utah 577, 65-7, 213 P. 2d 325, 329 (1950).

124 MCCORMICK, EVIDENCE 621 (1954).

iar with mathematical computations will be sufficient.[125] Indeed courts will even take judicial notice of standard tables.[126] Nevertheless the best procedure is to call an actuary and have him explain the table.

Mortality tables are admissible in every death case. In injury cases they are admissible only where the injury is such as to indicate a permanent material impairment of a substantial nature in the earning capacity of the plaintiff, or permanent pain or disability.[127] The best course is to precede introduction of the table with medical testimony that the injury is permanent, but even in the absence of such testimony the table is admissible if from the injury itself it is a fair inference that it will be permanent.[128]

Mortality tables are not "an unerring guide" to the period any particular individual will live.[129] As one court has put it:

> Life expectancy is based on the law of averages. It would be the rare case indeed, we suspect, that any person died on the date of expiration of his calculated expectancy. The expectancy tables not only take into consideration the known fact that any person may die prior to his calculated expectancy but also the known fact that he may live far beyond that period.[130]

In order to guard against any tendency in the jury to seize uncritically the seemingly precise figures of the tables, the jury should be instructed that they are not conclusive, but are merely to be considered along with all the other evidence, as to the employee's age, health, habits, and occupation, in determining his probable length of life.[131] There is some controversy in the cases as to whether one party or the other is required to tender such an instruction, on pain of having waived his claim that omission of the instruction was prejudicial error.[132] The controversy is pointless. It is in the interest of both sides to have the jury properly instructed on this point, and there is no justification for ever failing to give the instruction.

The inconclusiveness of mortality tables should still those courts who calculate the employee's earning capacity for the period shown in the tables, and order a remittitur if the verdict is substantially in excess

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[125] Bennett v. Denver & R. G. W. R. Co., 117 Utah 57.65, 213 P. 2d 325, 328 (1950).

[126] *E.g.*, Alabama G. S. R. Co. v. Cornett, 214 Ala. 23, 30, 106 So. 242, 249 (1925); Hohlstein v. St. Louis Roofing Co., 328 Mo. 899, 42 S.W. 2d 573 (1931).

[127] *E.g.*, Schlatter v. McCarthy, 113 Utah 543, 196 P 2d 968 (1948).

[128] Thompson v. City of Seattle, 35 Wash. 2d 124, 211 P. 2d 500 (1949).

[129] *See* Hallada v. Great Northern Ry., 244 Minn. 81, 95, 69 N.W. 2d 673, 685 (1955), *cert. denied* 350 U. S. 874 (1955).

[130] Dempsey v. Thompson, 363 Mo. 339, 348, 251 S. W. 2d 42, 46 (1952).

[131] McCORMICK, DAMAGES 302-3 (1935). *But cf.* James v. Chicago, St. P., M. & O. Ry. Co., 218 Minn. 333, 16 N. W. 2d 188 (1944).

[132] *Compare* Avance v. Thompson, 387 Ill. 77, 55 N.E. 2d 57 (1944), *cert. denied* 323 U. S. 753 (1944), with Fritz v. Pennsylvania R. Co., 185 F. 2d 31, 36 (7th Cir. 1950).

of this sum. The correct attitude is illustrated by a federal district judge, who said, in refusing to find a verdict excessive:

> In view of the advanced age of decedent's parents, it is most conceivable that the jury considered the decedent's life expectancy, and his potential remunerative productivity, in considerable excess of the mean average demonstrated by the United States Mortality Table.[133]

Recently railroad attorneys have been demanding a more favorable sort of cautionary instruction than that described above. The point deserves to be examined in detail, both because of its superficial attractiveness and because of the indefatigable way in which some railroads refuse to give up on a good thing so long as there is a single jurisdiction that has not expressly rejected it. We here consider the demands for an instruction that the hazards of railroading are such that employees will not live as long as normal people. We believe such an instruction to be improper for two reasons: 1) it is argumentative, and argument should come from counsel in his closing rather than from the court in its instructions; and 2) to the extent that the hazards of railroading do shorten the expectancy of employees, this loss must be borne by the railroad, not by the next of kin of the employees.

So far as we can find, several inconspicuous cases in the early '40s provided the genesis of the present movement. In one the Missouri court, which is famous for its bizarre approach to damages, said:

> Sampson Sibert was fifty-one years of age at the time of his death. Because he was engaged in a hazardous occupation he was and should be treated as fifty-four years of age with a life expectancy of eighteen and nine-tenths years.[134]

A few years later the Kentucky court mentioned in an opinion that the defendant, the Louisville & Nashville Railroad, had called an insurance actuary who testified that because of the hazardous employment, the expectancy of a locomotive fireman should be reduced between four and five years below normal.[135] But the court did not comment or rule on this contention. Still later in federal district court in Minnesota a charge was given that mortality tables are not binding, and that the jury should consider the hazards of the occupation.[136] This very mild form of the charge now sought seems to have provoked no controversy, perhaps because the verdict was satisfactory to plaintiff.

The key case is *Thompson v. Camp*,[137] decided by the Sixth Circuit

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[133] Beattie v. Monongahela R. Co., 122 F. Supp. 803, 806 (W.D.Pa. 1954). And *see* Renaldi v. New York, N. H. & H. R. Co., 230 F. 2d 841, 845 (2d Cir. 1956): "The jury could have concluded that she was in good health and hence that she would outlive the life expectancy for persons of her age; * * * ."

[134] Sibert v. Litchfield & M. Ry. Co., 159 S. W. 2d 612, 618 (Mo. 1941).

[135] Louisville & N. R. Co. v. Stephens, 298 Ky. 328, 344, 182 S.W. 2d 447, 456 (1944).

[136] Giles v. Chicago G. W. Ry. Co., 72 F. Supp. 493 (D. Minn. 1947).

[137] 163 F. 2d 396 (6th Cir. 1947), *cert. denied* 333 U. S. 831 (1948).

in 1947. There the railroad asked that the jury be instructed to consider decedent's health, that all persons do not live to the age of expectancy, that such is particularly true in the case of hazardous occupations, that they may not work during all of the years of their life, that their earnings may not remain stationary and that the reasonably-to-be-expected contributions may vary or diminish in the future, and that the jury should not include any amount as contributions which the children would have received after they attained the age of twenty-one, since it is not presumed that they would have received any pecuniary benefits from the deceased thereafter. Failure to give this instruction was held to be prejudicial error, and a new trial as to damages was ordered. But it seems crystal clear from the opinion that the reversal was because recovery for the children was not limited to their minority. After stating at length the facts about the children, the court said:

> The evidence regarding the amount of the annuity was based on the assumption that part of his salary was used for the support of the children. In view of this background, we believe it was prejudicial error not to give the requested instruction. The evidence and the lump sum verdict provide no criterion for segregation of the recovery into different parts which would permit that a remittitur be ordered for the purpose of correcting the error.[138]

Our reading of *Thompson v. Camp* is supported by the Eighth Circuit. In 1949 that court, in *Louisville & N. R. Co. v. Botts*,[139] interpreted the earlier case as reversing for failure to limit the children's recovery to their minority, and affirmed a verdict in a case in which the "hazardous employment" instruction was requested and denied.

> That all persons do not live to the age of normal expectancy, especially in hazardous occupations, and that they may not work all their lives, or their earnings may otherwise terminate or diminish, are such commonplace facts, of daily consciousness, that they do not need to be made a matter of judicial fiat. If appellant believed that some reminder of them was necessary, they clearly were sufficiently emphasizable, for this purpose, in argument to the jury, as appellant in fact did.[140]

In the same year a Georgia decision agreed that these considerations are properly for the jury to weigh rather than to be made into a rule of law.[141]

The matter should have been put to rest by a decision of the Seventh

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[138] 163 F. 2d 396 at 404.

[139] 173 F. 2d 164, 169 (8th Cir. 1949)

[140] *Id.* at 170.

[141] Western & A. R. R. v. Burnett, 79 Ga. App. 530, 54 S.E. 2d 357 (1949). And in Texas & P. Ry. Co. v. Buckles, 232 F. 2d 257, 262 (5th Cir. 1956), *cert. denied* 351 U. S. 984 (1956), it was held not error to refuse to charge that railroading is a "hazardous occupation."

Circuit in 1951,[142] where it was very thoroughly considered. Defendant had requested the following instruction:

> You are instructed in estimating the present cash value of any future loss of earnings, you should also consider the fact that all persons do not live to the age of expectancy, and this is particularly true in the case of hazardous occupations such as that of a railroad switchman; that they may not work during all the years of their life; that their earnings may not remain stationary and that the reasonably to be expected earnings may vary or diminish in the future.[143]

The trial court rejected this request, and instead instructed the jury as follows:

> In estimating the present cash value of any future loss of earnings, you may also consider the fact that all persons do not necessarily live to the age of expectancy and that some persons live beyond the age of expectancy; that they may not work during all the years of their life; that their earnings may not remain stationary and that the reasonably to be expected earnings may vary and either diminish or increase in the future.[144]

The railroad claimed it was error to refuse its requested instruction. The appellate court rejected this contention.

> The instruction as proposed is argumentative and, besides, it tells the jury only that which every person of good sense knows. It would be just as informative for the court to instruct the jury that some people live longer than others, that a person exposed to danger is not as likely to live as long as one who is not and that some people retire but of those who do not some may receive an increase and others a decrease in wages. And we wonder if it could be possible that any jury would not know that a railroad switchman is engaged in a hazardous occupation? The instruction as modified and given is also subject to the criticism that it is argumentative, but it at least has the virtue of presenting both sides of the argument. Certainly there was no error in the giving of this instruction, particularly in view of that which was requested by the defendant.[145]

There the matter should have ended. But one-sided instructions (whether favoring plaintiffs or defendants) do not even fade away, much less die. In 1952 the same instruction rejected in the case just discussed was presented in Kentucky by the tireless Louisville & Nashville Railroad. And the Kentucky Supreme Court, citing *Thompson v. Camp* but not mentioning the 7th or 8th Circuit decisions we have here considered, held that such an instruction should be given.[146]

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[142] O'Donnell v. Elgin, J. & E. Ry. Co., 193 F. 2d 348 (7th Cir. 1951), *cert. denied* 343 U.S. 956 (1952).

[143] 193 F. 2d at 354.

[144] *Ibid.*

[145] *Ibid.*

[146] Louisville & N. R. Co. v. Young's Adm'x., 253 S. W. 2d 585, 590 (Ky. 1952).

As we indicated at the outset of this discussion, we not only agree with the distinguished courts which have held the instruction in question improperly argumentative, but would go further and say it is a false argument. It is true that railroading is a hazardous business. Although the incidence of injury is lower in the railroad industry than in manufacturing operations, the severity rate is twice as high, and the rate of fatalities is much higher than in other industries.[147] But is this any reason for limiting the damages awarded to victims? Suppose that a 30 year old man, for whom the tables show an expectancy of 35 years, is killed or permanently injured. Can the railroad be heard to say, "Well, we would probably have killed him by the time he was 60 in any event, so he should have only 30 years' damages instead of 35"? The Supreme Court tells us that every vestige of the doctrine of assumption of risk has been obliterated by the 1939 amendments to the Act.[148] If damages are to be decreased because the hazards of the industry would have caught up with the employee sooner or later, then surely assumption or risk has come back in by the cellar door.

So far as we can fathom, railroad employees are no more careless of their own safety than are workers in other industries, pedestrians on a busy street, or people in their bathtubs. Indeed the railroad employee is trained to be safety conscious, and thus is probably more careful than most. Accidents to railroad employees are attributable principally to three factors: the railroad's failure to furnish a safe place to work; its failure to adopt or enforce proper rules, customs and practices; and its failure to furnish safe equipment which functions properly. These omissions by the railroad, even though they are actually carried out through its employees, are chargeable to the company by law. A railroad is not entitled to pay less for its negligence today because it will probably be negligent tomorrow. The jury should make no deduction because of the hazards of the occupation.

III. Reduction to Present Worth

Calculation of damages would be easy if the amount of loss, determined according to the principles set out earlier, could simply be multiplied by the period for which such loss is recoverable. Of course this is not permissible.[149] Thanks to the earning power of money, a dollar in hand received as part of a judgment today is worth considerably more than a dollar which would be earned forty years from today. Thus insofar as the verdict is based upon the deprivation of future benefits these benefits must be discounted by the interest which will be earned on the money between the time it is paid and the time the benefits would have

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[147] Richter and Forer, *Federal Employers' Liability Act,* 12 F. R. D. 13, 48-9 (1952).

[148] *See* Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 58 (1943).

[149] Avance v. Thompson, 387 Ill. 77, 84 55 N. E. 2d 57, 60 (1944), *cert. denied* 323 U. S. 753 (1944).

been received.[150] The usual phrase for this is that the loss must be reduced to present worth.

This procedure applies only to the compensation for pecuniary losses. The award for non-pecuniary losses, such as pain and suffering, or embarrassment and humiliation, need not be discounted.[151]

Calculation of the present value of a monthly income over a period of years is, as one court has said, "no simple mathematical problem."[152] Professor McCormick correctly says that "to do this in detail would be difficult and tedious, and no jury would attempt it, unless one of its members were an accountant."[153] In practice it is necessary to resort either to annuity tables, which state the present value of periodic payments of a given sum for various periods and various interest rates, or to have expert testimony as to the present value. States may apply their own rules as to which of these methods of proof to admit, but they are required, in a FELA action, to allow one or the other.[154]

No matter whether annuity tables or actuarial testimony is employed, determination of the present worth requires a decision as to the rate of interest to be employed in the calculation. The higher the assumed rate of interest, the smaller the present worth of the required sum, and thus the smaller the verdict.

It is claimed that most state courts demand that the legal rate of interest be used in reducing to present worth, a rule which would be highly favorable to defendants.[155] The uniform federal rule, which must

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[150] Chesapeake & O. Ry. Co. v. Kelly, 241 U. S. 485 (1916). Where the injured person retains some earning capacity, see pp. 436-7 above, he is entitled to the present worth of the difference, in each particular year, between the amount he would have made absent the injury and the amount he can now be expected to make. Merely to determine the present worth of the expected earnings absent the injury, and then to deduct from this the gross amount he will actually make in the future, as suggested in Hallada v. Great Northern Ry., 244 Minn. 81, 96 n. 37, 69 N. W. 2d 673, 685 n. 37 (1955) *cert. denied* 350 U. S. 874 (1955), would be to credit the plaintiff with the interest on the proceeds of his retained earning capacity, even though he does not receive that in advance and thus enjoys no interest on it.

[151] Texas & P. Ry. Co. v. Buckles, 232 F. 2d 257, 264 (5th Cir. 1956), *cert. denied* 352 U. S. (1956); Chicago & N. W. Ry. Co. v. Chandler, 283 Fed. 881 (8th Cir. 1922); Braddock v. Seaboard Air Line R. Co., 80 So. 2d 662 (1955); Louisville & N. R. Co. v. Bean, 49 Ga. App. 4, 174 S.E. 209 (1934); Louisville & N. R. Co. v. Gayle, 204 Ky. 142, 263 S.W. 763 (1924); Yost v. West Penn. R. Co., 336 Pa. 407, 9 A. 2d 368 (1939); *see* Ahlstrom v. Minneapolis, St. P. & S.S. M. R. Co., 244 Minn. 1, 29-30, 68 N.W. 2d 873, 891 (1955); McCORMICK, DAMAGES 318 (1935); Notes, 28 A.L.R. 1177 (1924), 77 A.L.R. 1439, 1451-3 (1932). *Contra*: Gleason v. Lowe, 232 Mich. 300, 205 N.W. 199 (1925); Rigley v. Pryor, 290 Mo. 10, 233 S. W. 828 (1921). *See* Drlik v. Imperial Oil, Ltd., 141 F. Supp. 388, 394 (N.D. Ohio 1955), *aff'd* 234 F. 2d 4 (6th Cir. 1956).

[152] Schlatter v. McCarthy, 113 Utah 543, 556, 196 P. 2d 968, 974-5 (1948).

[153] McCORMICK, DAMAGES 304-5 (1935).

[154] Chesapeake & O. Ry. Co. v. Kelly, 241 U. S. 485, 491 (1916).

[155] Anno., 105 A.L.R. 234.

be applied in FELA cases, is to the contrary. In FELA cases the interest rate used is the highest obtainable on reasonably safe investments made by persons of ordinary care and prudence in the community where they live without the exercise of financial experience and skill in the administration of the fund. Occasionally a court will undertake to decide this question for itself. In a 1944 case a banker had testified that the highest net rate of interest that might be expected from safe and secure investments was from 2 to 2½% per year, though he admitted that real estate loans might bear an average of 4¾%. The appellate court, in testing the verdict and finding it excessive, assumed a rate of 4%, saying:

> We do not think it fair to accept the smaller rate, for it is to be remembered that we are looking over a period of probably a quarter of a century, and experience teaches that the present abnormal condition in the money market will not continue always.[157]

In defense of the court it may be said that its crystal ball was no more clouded than was that of some economists at the time. The court's real mistake was not realizing that, as a long line of cases has held, the appropriate interest rate is a question of fact, to be decided by the jury, and not a question of law;[158] the same standard must apply to this as to all other fact questions in FELA cases, that the court must take the view of the facts most favorable to the verdict, and cannot substitute its judgment for that of the jury if there is any evidence to support the jury's finding. In the case discussed, the evidence of the banker would have justified a jury in finding 2% to be an appropriate interest rate, and the reviewing court must assume that the jury did so find. Since it is a jury question, evidence should be presented on this as on all other facets of the case. Normally a banker should be called to give expert testimony as to obtainable returns on safe investments.[159]

Though some consider annuity tables "not an unmixed blessing,"[160] there is no difficulty in having them admitted, as an exception to the hearsay rule.[161] Actuarial testimony is more likely to be challenged. Oc-

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[157] Louisville & N. R. Co. v. Stephens, 298 Ky. 328, 344-5, 182 S.W. 2d 447 (1944). And in Virginian Ry. Co. v. Armentrout, 166 F. 2d 400, 407 (4th Cir. 1948), discussed also p. 468 below, the court rejected as unreasonable a finding below that 2% was the proper discount rate.

[158] Wentz v. T. E. Connolly, Inc. 45 Wash. 2d 127, 138, 273 P. 2d 485, 492 (1954). And see cases cited at Anno., 105 A.L.R. 234, 237-42.

[159] *E.g.*, Starck v. Chicago & N. W. Ry. Co., 4 Ill. 2d 611, 624, 123 N. E. 2d 826, 833 (1954); *cf.* Bennett v. Denver & R.G.W. R. Co., 117 Utah 57, 64, 213 P. 2d 325, 328 (1950) (investment counsellor).

[160] Schlatter v. McCarthy, 113 Utah 543, 555, 196 P. 2d 968, 974 (1948). But compare Wolfe, J., concurring at 558, 196 P. 2d at 976: "I feel sure that such tables usually produce larger verdicts but I am not prepared to say that they are out of proportion to the injury sustained."

[161] Vicksburg & M.R. Co. v. Putnam, 118 U. S. 545, 554 (1886); McCORMICK, EVIDENCE 621 (1954).

casionally it may be excluded altogether,[162] but more often the problem will be as to the kind of testimony the actuary can give. The actuary is an expert, and his testimony should be limited by the rule which generally applies to hypothetical questions asked of experts. This rule is that the hypothetical question can include any facts fairly inferable from the circumstances proved at the trial.[163]

It would follow from this rule that the actuary cannot be asked to testify on the basis of a theory of damages which the jury could not adopt. Thus in a death action, where as we have seen contributions must be the measure, it would be error to allow the actuary to testify as to the present worth of gross earnings, since the jury is not free to calculate damages on the basis of gross earnings.[164] At the same time, it is not error to admit testimony based on certain assumptions as to the amount of the contributions even though the evidence would have permitted the jury to value the contributions at some other amount.[165] Instead it should be proper to ask the actuary the present value on the basis of any assumptions as to amount of loss, period of loss, and interest rate which the jury might permissibly find.

The principle here stated was qualified in a notable recent case in which we represented the plaintiff.[166] Evidence had been presented from which the jury might have found that the next of kin could reasonably have expected contributions of $378.09 per month from the deceased, that he had an expectancy of 38 years and 8 months, and that safe investments by an unskilled person would yield from 2½ to 3%. The actuary testified that the present worth of $378.09 for the period in question at 2½% would be $112,904.37, and that at 3% it would be $104,418.69. Defendant contended on appeal from a verdict of $127,500 that, by the actuary predicating her ultimate results upon a specific sum and period, probative value was added to that sum and period, thus invading the province of the jury. The court said:

> To allow an actuary to testify to figures, which the jury might adopt as real, carries with it the danger that the jury will accept them not only as the actuary's explanation of his process of computation but also as proof of contribution and life and work expectancy. * * *
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> We are of the opinion that the proper method of assisting a

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[162] *E.g.*, Caldwell v. Southern Pac. Co., 71 F. Supp. 955 (S. D. Cal. 1947).

[163] McCORMICK, EVIDENCE §14 (1954).

[164] Wetherbee v. Elgin, J. & E. Ry. Co., 191 F. 2d 302 (7th Cir. 1951), *cert. denied* 346 U. S. 867 (1953). *Accord*: Chicago & N. W. Ry. Co. v. Curl, 178 F. 2d 497 (8th Cir. 1949), holding it proper to refuse the railroad's offer of actuarial testimony as to the present worth of net earnings, after deductions for income tax and railroad retirement, since these deductions should not be made by the jury.

[165] Southern Pac. Co. v. Klinge, 65 F. 2d 85, 87 (10th Cir. 1933), *cert. denied* 290 U. S. 657 (1953).

[166] Allendorf v. Elgin, J. & E. R. Co., 8 Ill. 2d 164, 133 N.E. 2d 288 (1956).

> jury in making damage calculations is for the actuary to use neutral figures. In the usual situation where hypothetical inquiries are permissible, it is necessary that the expert assume a factual situation as reflected in the proof in order to insure that his testimony bears upon the issue to be determined. The actuary, however, is called upon only to describe to the jury a mathematical process that will simplify the jury's task of determining the present value of the contribution that plaintiffs would have received had decedent not been killed. To accomplish that purpose it is not necessary that he use figures that correspond with those appearing in evidence, and when he does so there is a danger that the jury may be misled. Once the formula is before the jury, its application to the facts of the case is a matter for argument of counsel.[167]

Our criticism of this formulation is not to be attributed to the disappointment of losing counsel, for the court found the actuarial testimony not prejudicial and affirmed the verdict. We differ with the court in its assumption that the expert's function is merely "to describe to the jury a mathematical process." The process is one, as we pointed out earlier, which the jury cannot perform by itself. If the actuary is to be of any use, he must at least be permitted to give the present worth of payments of $1 a month for a stated number of months. The jury, assisted by closing argument, can safely be left to multiply that sum by the amount of loss per month which they find. But there is no "neutral figure" the actuary can use as to the length of the period. Some assumption must be made. And the defendant can avoid being harmed by asking the actuary, on cross-examination, to state the present worth of $1 a month for such period of months as the defendant thinks the evidence might justify.

IV. Appellate Review

The jury has determined the amount of loss and the period for which it is recoverable, and has reduced to present worth those elements of the damages which are subject to such a reduction. It has returned a verdict. The trial judge has considerable control over that verdict. He may order a new trial,[168] or require a remittitur,[169] if he believes that the jury has determined damages improperly. This power has caused little difficulty. But assume that the trial court, believing that damages have been properly assessed, denies the motion for new trial and orders judgment for the plaintiff. What power does the appellate court have over that determination? We look first to the scope of review, in federal and state courts respectively, and then consider the kinds of errors below for which appellate courts have reversed.

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[167] 133 N.E. 2d 288 at 294-5.

[168] McCormick, Damages 71-4 (1935); 6 Moore's Federal Practice §59.08 [6] (2d ed. 1953).

[169] Blunt v. Little, 3 Fed. Cas. No. 1578 (C.C.,D.Mass. 1822) (*per* Story, J.); Comiskey v. Penna R. Co., 228 F. 2d 687 (2d Cir. 1956). 6 Moore's Federal Practice §59.05 [3] (2d ed. 1953).

Scope of review in federal courts

Little more than a decade ago, a FELA defendant challenged a verdict on appeal to the Third Circuit on the ground that it was excessive. Judge Goodrich's answer stated what was then the settled federal rule as to review for excessiveness:

> The members of the Court think the verdict is too high. But they also feel very clear there is nothing the Court can do about it. * * * A long list of cases in the federal courts demonstrates clearly that the federal appellate courts, including the Supreme Court, will not review a judgment for excessiveness of damages even in cases where the amount of damage is capable of much more precise ascertainment than it is in a personal injury case.[170]

The rule has not been changed in the interim by the Supreme Court, unless by one casual word in an opinion to be discussed later.[171] Yet today 10 of the 11 circuits believe that when a verdict seems to them excessive, there is something the court can do about it.

The precedents which supported Judge Goodrich's statement were clear enough. In an early FELA case, the verdict was attacked on appeal as excessive, and indeed on the stated facts, it might well have been thought to be excessive. But Justice Holmes, for the Supreme Court, announced that this was not ground for reversal.

> It may be admitted that if it were true that the excess appeared as matter of law,—that if, for instance, the statute fixed a maximum and the verdict exceeded it,—a question might arise for this court. But a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error.[172]

Nearly twenty years later, in the *Fairmount Glass Works* case,[173] Justice Brandeis stated that the same rule applies to the circuit courts of appeal when reviewing actions of the federal district courts. Our leading scholar on damages reads that case as holding that the trial court's denial of a new trial for excessive damages "may not be reviewed for merely erroneous exercise of discretion,"[174] and that it is not grounds for reversal that "the jury has made an unreasonable award."[175]

Perhaps there is some law of nature that the power of appellate courts remains contant.[176] For it was at the end of the '40s, when the Supreme Court had taken away the power of appellate courts to substitute

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[170] Scott v. Baltimore & O. R. Co., 151 F. 2d 61, 64-5 (3d Cir. 1945).

[171] *See* Affolder v. New York, C. & St. L. R.R., 339 U.S. 96, 101 (1950), discussed pp. 471-2 below.

[172] Southern Railway—Carolina Division v. Bennett, 233 U.S. 80, 87 (1914).

[173] Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 (1933).

[174] McCORMICK, DAMAGES 67 n. 18 (1935).

[175] *Id.* at 75.

[176] For a brilliant exposition of the transfer of power from the trial court and jury to appellate courts, see Green, *Jury Trial and Mr. Justice Black*, 65 YALE L. J. 482 (1956).

their judgment for that of the jury on liability issues,[177] that federal appellate judges first began to claim the power to control the amount of damages. The first break came in 1948, in *Virginian Railway Co. v. Armentrout.*[178] A backing locomotive had cut off the hands and portions of the arms of a 13 months old infant. On an earlier appeal, a verdict of $100,000 had been set aside, and a new trial ordered, for errors of substantive law in the charge.[179] At the subsequent trial, the jury awarded $160,000, and the trial court denied a motion to set the verdict aside as excessive. The Fourth Circuit stated that there could be no question but that this verdict was greatly in excess of any proper award. And after citing the *Fairmount Glass Works* case for the proposition that normally there can be no reversal for excessive damages, the court said:

> We do not understand the rule to have application, however, in those exceptional circumstances where the verdict is so manifestly without support in the evidence that failure to set it aside amounts to an abuse of discretion. In a situation of that sort, reversal is no more based on "error in fact" than reversal for refusal to direct a verdict for insufficiency of evidence. Whether there has been an abuse of discretion is a question of law in the one case, just as is the legal sufficiency of the evidence in the other. An appellate court is not required to place the seal of its approval upon a judgment vitiated by an abuse or discretion.[180]

Holding that the trial court had abused its discretion in denying the motion for a new trial on the ground of excessive damages, the Fourth Circuit reversed for a new trial.

The *Armentrout* decision might well have been a sport, soon to be forgotten, had it not been for one word which crept into a Supreme Court decision the following year. In *Affolder v. New York, C. & St. L. R. R.*,[181] the Court closed an opinion devoted entirely to substantive issues with the following sentence:

> We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case.[182]

The floodgates were opened. Impatient appellate judges[183] found in this offhand sentence an implication that there can be reversals for excessive damages if the verdict is "monstrous" and proceeded to write off the books the old law of nonreviewability.

In 1949, before *Affolder,* the Ninth Circuit unanimously agreed

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[177] *Id.* at 488.

[178] 166 F. 2d 400 (4th Cir. 1948).

[179] 158 F. 2d 358 (4th Cir. 1946).

[180] 166 F. 2d 400 at 408.

[181] 339 U.S. 96 (1950).

[182] *Id.* at 101.

[183] And some commentators. See 6 MOORE'S FEDERAL PRACTICE §59.08 [6] (2d ed. 1953).

that $100,000 was too much for the loss of a leg, but a majority of the court held that they lacked power to do anything about it.[184] In 1951, on rehearing *en banc*, that court announced that *Affolder* had confirmed the power of appellate courts to set aside grossly excessive verdicts, but decided that the verdict before it, while excessive, was not grossly excessive.[185] A dissenting judge, with more candor than most, would have swept aside nice distinctions about excessive and grossly excessive, and claimed the appellate court should reverse whenever it thinks the verdict is too high.[186] That same year the Third Circuit, whose 1945 announcement that there is nothing an appellate court can do if a verdict is excessive has been quoted above,[187] said, by way of dicta, that it can reverse if the verdict is grossly excessive.[188] This court also announced that its new rule was in accord with the implications of the *Affolder* case. And in 1951 the Sixth Circuit claimed, but did not exercise, a power to reverse if the verdict is so excessive that the trial court abused his discretion in denying a new trial.[189]

Every other circuit except the Eighth has followed suit, though not without confusion and difficulty. In 1951 the Seventh Circuit considered the whole matter carefully, said that even despite *Affolder* it could not reverse because a verdict is excessive, but announced that where it believed the verdict to be too high, it would scrutinize the record with care to hunt for other error. To no one's surprise, it found some.[190] Twice in 1952 the court stuck by the proposition that it would not review a judgment for excessiveness of damages.[191] But later that year, the Seventh Circuit also succumbed.[192] The Supreme Court cases holding there is to be no review on this ground were blithely cast aside as "an old procedural impediment" which "no longer bars review."[193] Nor did the court linger over the "grossly excessive" and "monstrous" tests which had attracted other courts. These were dismissed as "little more than comparatives dependent for their meaning upon the facts of each case, the nature of the damages, the wrong to be remedied."[194] Mere excess

[184] Southern Pac. Co. v. Guthrie, 180 F. 2d 295 (9th Cir. 1949).

[185] Southern Pac. Co. v. Guthrie, 186 F. 2d 926 (9th Cir. 1951), *cert. denied* 341 U.S. 904 (1951).

[186] 186 F. 2d 926 at 934.

[187] P. 467 above.

[188] *See* Trowbridge v. Abrasive Co. of Philadelphia, 190 F. 2d 825, 830 (3d Cir. 1951). And *see* Brest v. Philadelphia Transportation Co., 216 F. 2d 331 (3d Cir. 1954).

[189] *See* Sebring Trucking Co. v. White, 187 F. 2d 486 (6th Cir. 1954).

[190] Wetherbee v. Elgin, J. & E. Ry. Co., 191 F. 2d 302 (7th Cir. 1951), *cert. denied* 346 U.S. 867 (1953).

[191] Flener v. Louisville & N. R. Co., 198 F. 2d 77, 80 (7th Cir. 1952); Kaminski v. Chicago R. & I. R. Co., 200 F. 2d 1 (7th Cir. 1952).

[192] *See* Bucher v. Krause, 200 F. 2d 576, 586-8 (7th Cir. 1952), *cert. denied* 345 U.S. 997 (1953).

[193] 200 F. 2d 576 at 586.

[194] 200 F. 2d 576 at 587.

is enough for reversal in the Seventh Circuit. As was true of so many of the other circuits, this new law was announced as dicta in a case where the court found the verdict not excessive.

The Tenth Circuit has found a power to reverse for excessive damages, but announced a rule of self-restraint that the trial court will not ordinarily be held to have abused its discretion unless it affirmatively appears that the verdict resulted from bias, prejudice, or passion.[195] And the District of Columbia Circuit, in a more thoughtful opinion than most, has adopted the "grossly excessive or monstrous" test.[196]

The First and Second Circuits stood by the old law for a time. In 1952 the First Circuit said unequivocally that "the defendant cannot relitigate the issue of damages on this appeal, as it seeks to do."[197] And in 1954 then-Judge Harlan, for the Second Circuit, examined the old precedents with care, declared them to be still the law, and said that an appellate court will not even consider whether the trial judge should have so appraised the facts evidenced in the record as requiring an exercise of his discretionary power.[198] These were dying gasps. Both circuits have since enlisted under the banner of more power for appellate judges.[199] One surmises that the Fifth Circuit has also adopted that view, though its decisions seem to us somewhat inconsistent.[200]

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[195] *See* Chicago, R. I. & P. R. Co. v. Kifer, 216 F. 2d 753, 757 (10th Cir. 1954), *cert. denied* 348 U. S. 917 (1955).

[196] *See* Hulett v. Brinson, 229 F. 2d 22, 23-5 (D.C. Cir. 1955), *cert. denied* 350 U.S. 1014 (1956).

[197] New York, N.H. & H. R. Co. v. Zermani, 200 F. 2d 240, 245-6 (1st Cir. 1952), *cert. denied* 345 U.S. 917 (1953).

[198] Stevenson v. Hearst Consol. Publications, Inc., 214 F. 2d 902, 911-2 (2d Cir. 1954), *cert. denied* 348 U.S. 874 (1954). *Accord*: Kennair v. Mississippi Shipping Co., 197 F. 2d 605, 607 (2d Cir. 1952): "While it may be that the amount of the award is somewhat large in view of the injuries sustained, we have held on more than one occasion that we will not interfere in such a situation and that the reduction of the jury's verdict is a matter wholly within the discretion of the trial judge."

[199] *See* Ballard v. Forbes, 208 F. 2d 883, 888 (1st Cir. 1954); Comiskey v. Penna. R. Co., 228 F. 2d 687, 688 (2d Cir. 1956). *But cf.* Renaldi v. New York, N.H. & H. R. Co., 230 F. 2d 841 (2d Cir. 1956).

[200] The most recent pronouncement, Fort Worth & D. R. Co. v. Harris, 230 F. 2d 680, 682 (5th Cir. 1956), is that excessiveness of the verdict is exclusively for the trial court to determine. This reflects a whole line of post-*Affolder* decisions to that effect: Texas P-M Pac. Term. R. v. Welsh, 179 F. 2d 880, 882 (5th Cir. 1950); Sunray Oil Corp. v. Allbritton, 187 F. 2d 475 (5th Cir. 1951), *cert. denied* 342 U.S. 828 (1951); Atlantic Coast Line R. Co. v. Burkett, 192 F. 2d 941, 945 (5th Cir. 1951); Atlantic Coast Line R. Co. v. Dixon, 207 F. 2d 899 (5th Cir. 1953). But seeing is believing. Though it is not even cited in the latest Fifth Circuit opinion in point, in Whitman v. Pitrie, 200 F. 2d 914 (5th Cir. 1955), that court actually ordered a new trial as to damages because of abuse of discretion by the trial judge in denying a new trial for an excessive verdict. It should incidentally be noted that the most exhaustive and scholarly discussion anywhere in the literature supporting appellate review of the size of verdicts is the dissent of Judge Holmes in Sunray Oil Corp. v. Allbritton, *supra*, at 477.

Only the Eighth Circuit has stood firm. It was the Eighth Circuit which was reversed, though not on any damages issue, in the *Affolder* case. And therein lies a story. Does the one word "monstrous", in the final sentence of the *Affolder* opinion, mean that the Supreme Court was giving appellate courts a power which had always theretofore been denied by Supreme Court decisions? Close examination of *Affolder* is justified.

The *Affolder* case was a suit under the Safety Appliance Act for injuries sustained when two cars failed to couple automatically upon impact. The verdict was $95,000, and a remittitur of $15,000 was ordered by the trial court. The opinion of the Eighth Circuit was devoted to claims of error in the instructions to the jury as to proximate cause. That court, believing it found error, reversed.[201] But it went on to say that the assignment of error that the verdict was excessive was not properly addressed to the appellate court, citing cases which had laid down the rule of nonreviewability.[202] Affolder's petition for certiorari was granted. Neither his petition nor his brief said a word about damages. At the very end of respondent's brief, there was a two page discussion of damages.[203] It was not directed to whether the damages were "monstrous" or otherwise excessive. It claimed only that the Eighth Circuit's decision that it could not review the amount of damages was in conflict with the decision of the Fourth Circuit in *Armentrout*, that the *Armentrout* rule should prevail, and that if the Court should decide for Affolder on the causation issue, it should remand to the Court of Appeals to determine whether the damages were, in fact, excessive. There was no discussion of the history of nonreviewability, nor of any cases prior to the *Armentrout* decision one year before. Petitioner's reply brief devoted three pages to this issue.[204] It cited the Supreme Court decisions which had denied a power to review the amount of damages, and discussed the facts briefly to show that in any event the award was quite reasonable.

Thus the statement by the Supreme Court that "we agree with the Court of Appeals that the amount of damages * * * is not monstrous"[205] is incorrect. The Court of Appeals had formed no opinion one way or the other as to the reasonableness of the judgment, as that court itself quickly pointed out.[206] Second, the railroad had not claimed in the Supreme Court that the damages were "monstrous" or otherwise excessive; it had claimed only that the Court of Appeals should pass on the question.

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[201] New York, C. & St. L. R. Co. v. Affolder, 174 F. 2d 486 (8th Cir. 1949).

[202] *Id.* at 493.

[203] Brief for Respondent, pp. 34-5, Affolder v. New York, C. & St. L. R. Co., 339 U.S. 96 (1950).

[204] Reply Brief for Petitioner, pp. 16-8, Affolder v. New York, C. & St. L. R. Co., 339 U.S. 96 (1950).

[205] 339 U.S. 96 at 101.

[206] *See* St. Louis Southwestern Ry. Co. v. Ferguson, 182 F. 2d 949, 955 (8th Cir. 1950).

Third, if *Affolder* really meant to make new law as to reviewability, as so many of the circuits have thought,[207] it is remarkable that the Supreme Court should have announced this new law: (a) by a casual phrase in an opinion otherwise entirely devoted to other issues; (b) without paying the old precedents at least the respect of pointing out why they are no longer the law; and (c) in a case where the briefs made not the slightest attempt to explain why the law had, or should be, changed. It may be that this is the way the Supreme Court makes new law. But it may also be that impatient Court of Appeals judges have succumbed to the temptation "to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant * * *."[208]

The Eighth Circuit has stuck to its guns. There alone is the decision of the trial judge and the jury final on the amount of damages.[209] But lately there have been tantalizing hints that that great court may soon have impressive support. Twice recently the Supreme Court has granted certiorari to review decisions in which appellate courts have ordered new trials because of excessive damages. In each case the petition for certiorari asked the Court to decide whether the Courts of Appeals have such a power. But the Court has never reached the question of power, for in both cases the Court found that there was evidence to support the verdict, and thus that the Court of Appeals, whether or not it had the power, should not have intervened.[210] One of these cases, *Neese v. Southern Railway Co.*, has been set out in detail earlier.[211] The judgment there was generous by any test. The Fourth Circuit treated it as if it were an extreme example of an excessive verdict.[212] The decision by the Supreme Court that the judgment should have been affirmed shows, at the

[207] *But see* Stevenson v. Hearst Consol. Publications, Inc., 214 F. 2d 902, 911-2 (2d Cir. 1954) (*per* Harlan, J.), *cert. denied* 348 U.S. 874 (1954).

[208] L. Hand, J., in Spector Motor Serv., Inc. v. Walsh, 139 F. 2d 809, 823 (2d Cir. 1943).

[209] National Alfalfa Dehydrating & Milling Co. v. Sorenson, 220 F. 2d 858, 861 (8th Cir. 1955): "Defendant's first contention is that the verdict is excessive. The short answer to this contention is that in Federal courts in tort cases the question of the alleged excessiveness of the verdict is not reviewable on appeal." But there is very recent dicta that makes us fearful even the Eighth Circuit may be weakening. Chicago G. W. Ry. Co. v. Casena, 234 F. 2d 441, 448-9 (8th Cir. 1956).

[210] Neese v. Southern Ry. Co., 350 U.S. 77 (1955); Snyder v. United States, 350 U.S. 906 (1955).

[211] Pp. 449-50 above.

[212] It called the verdict "far beyond the pale of any reasonable probability and entirely without support in the record." Southern Ry. Co. v. Neese, 216 F. 2d 772, 776 (4th Cir. 1954), *rev'd* 350 U.S. 77 (1955). In the other case, United States v. Guyer, 218 F. 2d 266 (4th Cir. 1954), *rev'd sub nom.* Snyder v. United States, 350 U.S. 906 (1955), the trial court, sitting without a jury, had awarded $8000 each in a suit for wrongful death of two girls, 6 years old and 8 weeks old, under the Federal Tort Claims Act. The Fourth Circuit, saying that it is practically impossible to determine the value of the life of a little child, almost casually cut the awards to $5000 each.

very least, that the Courts of Appeal should be cautious indeed in reversing verdicts because of the size of the damages. If the decision of the trial judge and jury in *Neese* was proper, as the Supreme Court held, there will be very few cases where appellate intervention will be proper.

Perhaps by reversing in *Neese* without reaching the question of power, the Supreme Court hoped to cut down on appellate interference with damage awards,[213] without however absolutely barring the door against such interference should a really extreme case come along. With deference to a Court that has done great things for the railroad workman in breathing life into FELA, we suggest that such a course is unwise. There are some Courts of Appeal which will imagine they see such an extreme case in every moderately adequate award. The Supreme Court will not, and should not, grant certiorari every time an appellate court disagrees with the trial court on the reasonableness of the damages.[214] The extreme verdict, against which a residual appellate power may be thought desirable, strikes us as an imaginary horror. We have participated in and read thousands of FELA cases, and have yet to see a verdict, approved by the trial court, which was so high that reasonable men would necessarily agree it was out of line. We have seen generous verdicts—though all too few. We have seen a few verdicts which were more than we would have awarded, had we been on the jury. But we have never found one that was plainly "monstrous."

The best safeguard against an extreme verdict is the common sense of the jury. On all other issues we trust the constitutional tribunal—why not on damages? And should the jury err, the trial judge has ample power to set the verdict aside.[215] If he concurs in the judgment of the jury, we believe there is no need for further review of the damages. Those appellate courts which have held otherwise have brought upon themselves an unnecessary burden, by inviting every losing railroad to relitigate damages on appeal, an endeavor which, in the light of the *Neese* case, should surely be futile.

Scope of review in state courts

It would seem that one uniform rule should govern the scope

[213] The *Neese* decision seems to be having this effect. *See* Renaldi v. New York, N.H. & H. R. Co., 230 F. 2d 841, 845 (2d Cir. 1956); Hulett v. Brinson, 229 F. 2d 22, 26 (D.C. Cir. 1955).

[214] Thus in Snyder v. United States, 350 U.S. 906 (1955), four of the justices would have dismissed the writ of certiorari as improvidently granted. See Note, *Supreme Court Certiorari Policy in Cases Arising Under the FELA*, 69 HARV. L. REV. 1441 (1956).

[215] "The trial judges have a heavy responsibility in these Federal Employer Liability Act cases to see the damages are kept within reasonable bounds. They apparently have considerable discretion in passing on motions for a new trial based on claimed excessive verdicts. They sense the atmosphere of the trial, have the feel of the case and have opportunity to observe whether bias, passion or prejudice are present." Padilla v. Atchison, T. & S.F. Ry. Co., 295 P. 2d 1023, 1028 (N.M. 1956). See also notes 168-9 above, and authorities there cited.

of review of damage awards in FELA actions. We know that the measure of damages itself is determined by a uniform federal rule, to which state conceptions must yield.[216] And the Supreme Court has held that no matter what a state appellate court can do in ordinary cases, it cannot order a remittitur in a FELA action but must grant a new trial, where the verdict was produced by passion and prejudice.[217] Finally on such issues as negligence and causation, state appellate courts have been confined within the same narrow limits which apply to review in the federal appellate courts.[218] Nevertheless, on damages the state courts have successfully exercised much broader powers of review than any federal court has claimed.[219] Those state courts which have discussed the question have said that their power of review of the amount of the verdict is a mere detail of practice and procedure, as to which the ordinary rules of the forum apply.[220] Analytically this cannot be justified. Under the cover of a local rule of practice, some states—most notoriously Missouri and Minnesota—have effectively transferred the power to determine damages from the jury to the appellate court, and have in fact substituted new and bizarre criteria of their own invention as to damages. If, as we are frequently told, the right to trial by jury is part and parcel of the worker's remedy under FELA,[221] those states which have stripped the jury of ultimate power over damages have taken away a vital part of the employee's remedy.[222] Perhaps the states have gotten away with this because of the difficulty of securing Supreme Court review of a state supreme court decision ordering a new trial

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[216] Chesapeake & O. Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916): "But the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal employers' liability act it must be settled according to general principles of law as administered in the Federal courts."

[217] Minneapolis, St. P. & S.S.M. Ry. Co. v. Moquin, 283 U.S. 520 (1931), approved 10 TEX. L. REV. 240 (1932).

[218] Tennant v. Peoria and P. U. R. Co., 321 U.S. 29, 35 (1944); Lavender v. Kurn, 327 U.S. 645, 653 (1946); Harsh v. Illinois Term. R. Co., 348 U.S. 940 (1955), *reversing* 351 Ill. App. 272, 114 N.E. 2d 901 (1953); Note, 37 CORNELL L. Q. 799, 800-1 (1952).

[219] The decision in Union Pac. R. Co. v. Hadley, 246 U.S. 330 (1918), holding that a state appellate court can order a remittitur if it thinks the verdict too high, came at a time when appellate courts were allowed much more leeway on all FELA questions than they are today.

[220] *See, e.g.,* Counts v. Thompson, 359 Mo. 485, 502-3, 222 S.W. 2d 487, 495 (1949); Avance v. Thompson, 320 Ill. App. 406, 418-9, 51 N.E. 2d 334, 340 (1943), *rev'd on other grounds* 387 Ill. 77, 55 N.E. 2d 57 (1944), *cert. denied* 323 U.S. 753 (1944). In Padilla v. Atchison, T. & S. F. Ry. Co., 295 P. 2d 1023, 1026 (N. M. 1956), the court said that it was bound by the federal standard of limited review of damages in FELA actions, but it overruled itself on this point, and determined that the scope of review is a mere detail of practice regulated by the law of the forum, in Rivera v. Atchison, T. & S. F. Ry. Co., 299 P. 2d 1090 (N.M. 1956).

[221] *See* Bailey v. Cent. Vt. Ry., Inc., 319 U.S. 350, 354 (1943).

[222] *Cf.* Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949).

because of excessive damages, or calling for a remittitur. Such a decision is not a final judgment of the state court, and cannot be reviewed by the Supreme Court,[223] though a similar order by a federal Court of Appeals would be reviewable.[224].

Some state courts have held consistently to a narrow and proper review of the amount of verdicts. These states adhere to the old rule of Chancellor Kent, that an appellate court will intervene because of the size of the verdict only where the verdict is so excessive, or so "flagrantly outrageous" as some courts put it,[225] as to show clearly that it was the result of passion, prejudice, or corruption.[226]

Other state courts do not consider themselves so confined. Thus even where the court admits that the verdict is not tainted by passion, prejudice, or corruption, it may unabashedly claim a right to weigh the evidence and determine the amount of permissible damages for itself.[227] The Minnesota Supreme Court, a new recruit to this camp, announces its "recourse to common sense and social practicality in given cases."[228] But even the broadest power of review claimed elsewhere palls in comparison with the audacity with which the Missouri Supreme Court butchers verdicts. In Missouri there is no nonsense of looking to the evidence below on damages. Instead huge remittiturs are ordered to reduce the award to an amount which the appellate court thinks comparable with awards it has approved in other cases.[229] Present Missouri practice has been summarized by a discerning commentator:

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223 *E.g.*, Mississippi Cent. R. Co. v. Smith, 295 U.S. 718 (1935). If the plaintiff consents to the remittitur, then the action of the state appellate court is technically an affirmance of a final judgment, and can be reviewed by the Supreme Court. *E.g.*, Union Pac. R. Co. v. Hadley, 246 U.S. 330 (1918).

224 *E.g.*, Neese v. Southern Ry. Co., 350 U.S. 77 (1955); STEARN & GRESSMAN SUPREME COURT PRACTICE 12-3, 130-1 (2d ed. 1954).

225 *See* Bartlebaugh v. Pennsylvania R. Co., 78 N.E. 2d 410, 414 (Ohio App. 1948), *modified* 150 Ohio St. 387, 82 N.E. 2d 853 (1948); Allied Van Lines, Inc. v. Parsons, 80 Ariz. 88, 293 P. 2d 420, 436 (1956) (non-FELA case).

226 *See* Atlantic Coast Line R. Co. v. Taylor, 260 Ala. 401, 408, 71 So. 2d 27, 33 (1954); Ericksen v. Southern Pac. Co., 39 Cal. 2d 374, 382, 246 P. 2d 642, 647 (1952), *cert. denied* 344 U.S. 897 (1952); Western & A. R. R. v. Burnett, 79 Ga. App. 530, 541-3, 54 S.E. 2d 357, 366-7 (1949); Hahn v. Moore, 133 N.E. 2d 900, 909 (Ind. App. 1956) (non-FELA case); Padilla v. Atchison, T. & S. F. Ry. Co., 295 P. 2d 1023, 1026 (N.M. 1956); Ward v. Denver & R.G.W. R. Co., 96 Utah 564, 593-4, 85 P. 2d 837, 850 (1939). Chancellor Kent first stated this much quoted formula in Coleman v. Southwick, 9 Johns. (N.Y.) 45, 6 Am. Dec. 253 (1812).

227 *E.g.*, St. Louis-San Francisco Ry. Co. v. King, 278 P. 2d 845, 848 (Okla. 1954); Rudolph v. City of New York, 150 N.Y.S. 2d 40 (App. Div. 1956); Jaffe, *Damages for Personal Injury: The Impact of Insurance,* 18 L. & CONTEMP. PROB. 219, 232-4 (1953).

228 *See* Ahlstrom v. Minneapolis, St. P. & S.S.M. R. Co., 244 Minn. 1, 27, 68 N.W. 2d 873, 889 (1955). *Accord:* Hallada v. Great Northern Ry., 244 Minn. 81, 69 N.W. 2d 673 (1955), *cert. denied* 350 U.S. 874 (1955).

229 *E.g.*, Cassano v. Atchison, T. & S. F. Ry. Co., 362 Mo. 1207, 247 S.W. 2d 786 (1952) ($60,000 verdict, reduced to $45,000 by trial court, and to $35,000 by

> As a practical matter, the appellate courts today act as a reviewing jury when a personal injury case comes before them on appeal. They now hold that they can review the weight of the evidence, and that they can review facts as a result thereof. They state that the parties should be afforded the experience of the court in determining the award for injuries. They state it is their duty to keep the damages uniform by the use of remittitur. * * *
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> In view of the questionable growth of remittitur, and the still existing doubts as to its validity in unliquidated actions, it would seem that the court would be rather hesitant in using the doctrine. However, as the figures above indicate, the supreme court uses remittitur with ever increasing frequency, and for huge reductions of the jury verdicts. One wonders how so many juries could be so badly mistaken in awarding damages.[230]

Passion and prejudice

Of course it is proper for either the trial or the appellate court to set aside the verdict if there has been misconduct in the trial of a sort to invite passion and prejudice among the jury.[231] This subject is hardly unique to damage issues. But we here take brief note of certain kinds of claimed misconduct which have special implications as to damages.

A court may intervene if counsel in his argument suggests to the jury extraneous factors as to damages which are not properly before the jury. Thus it would certainly be error for plaintiff's lawyer to tell the jury that one-third of the judgment will go to the attorney as his fee. By the same token defendant's lawyer may not tell the jury that the judgment is not subject to income tax. Although an early case held that an instruction to this effect by the court would be proper,[232] later cases have held that the taxability of the verdict, like the attorney's fee, is a matter between the plaintiff and a third party, in which the defendant has no interest, and which the jury should not be invited to consider.[233] So too in a recent case the defense managed to bring in

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appellate court); Counts v. Thompson, 359 Mo. 485, 222 S.W. 2d 487 (1949) (verdict of $165,000, reduced to $140,000 by trial court, and to $80,000 by appellate court).

230 Comment, *Power of the Appellate Courts of Missouri to Order Remittitur in Unliquidated Damage Cases,* 17 Mo. L. Rev. 340, 345-6, 348 (1952).

231 *See* Minneapolis, St. P. & S.S.M. Ry. Co. v. Moquin, 283 U.S. 520, 521 (1931).

232 Dempsey v. Thompson, 363 Mo. 339, 251 S.W. 2d 42 (1952).

233 In Hall v. Chicago & N.W. Ry. Co., 5 Ill. 2d 135, 125 N.E. 2d 77 (1955), noted 43 Ill.B.J. 810, defendant's jury argument that any award would be nontaxable was held prejudicial error, necessitating a new trial. It has also been held that the jury is not to be instructed to this effect. Combs v. Chicago, St. P., M. & O. Ry. Co., 135 F.Supp. 750 (S.D.Iowa 1955); Highshew v. Kushto, 134 N.E. 2d 555 (Ind. 1956); Maus v. New York, C. & St. L. R. Co., 135 N.E. 2d 253 (Ohio Sup. Ct. 1956). And see cases cited note 25 *supra.* In the *Maus* case, *supra,* the court expressly left open the question of what the judge should do if the jury, on

the fact that plaintiff was receiving a pension under the Railroad Retirement Act, though the trial court had earlier held that this was improper and not to be considered by the jury. The Third Circuit, holding that "the last moment reiteration by the defense of the barred evidence gravely and unwarrantably impaired the worth of plaintiff's claim to the jury," ordered a new trial.[234]

Defendants' lawyers would prefer not to have the jury consider that the injured or killed workman was a family man, apparently believing that the thought of the bereft family may tug at the jurors' heartstrings. Of course in a death action the facts as to the age of the wife and children must be admitted in evidence, since the damages to be awarded are directly related to these facts. And in a death case, it would be error to exclude the children from the courtroom, at least so long as they are well behaved, since they are parties in interest in the suit.[235] But if the suit is one for injuries, the existence of a family is irrelevant, and the senior author, when he was young, once jeopardized a verdict by asking the plaintiff if he had a family.[236] It is not misconduct, however, for the wife and children to be in the courtroom, and for the plaintiff to rejoin them when he leaves the stand,[237] although if the children are small they possibly can be excluded from the courtroom in an injuries case.

We do not countenance appeals to passion by counsel. At the same time we recognize that the maimed workman or the grief-stricken widow are inevitably pathetic sights, and that there is no way to exclude human sympathies from the courtroom. Some years ago, in a case tried by the senior author, a jury in federal court in New York awarded $130,000 to a 43 year old plaintiff who had been earning $2805.44 per year prior to the loss of both his feet. The plaintiff was a very small man, who wore leather protectors or pads which enabled him to walk on his knees with two little short canes. When he was called as a witness he necessarily walked from his wheel chair to the stand in this manner. The trial judge, in ordering a remittitur of $30,000, said:

I think that the members of the jury were unduly affected by

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its own initiative, asked about income tax. We believe the judge should say: "The matter of income tax has nothing to do with this case and will not be discussed or considered by you in any way."

[234] Sinovich v. Erie R. Co., 230 F. 2d 658 (3d Cir. 1956). Consider also Coleman v. Southern Pac. Co., 296 P. 2d 386 (Cal. App. 1956), where it was held prejudicial error to allow argument, evidence and instructions that a railroad employee suing for permanent disability resulting from a back injury had earlier received a $40,000 settlement from the railroad for a prior injury to his back, as to which he had then claimed possible permanent disability.

[235] Starck v. Chicago & N.W. Ry. Co., 4 Ill. 2d 611, 123 N.E. 2d 826 (1954); *cf.* Chicago G.W. Ry. Co. v. Beecher, 150 F. 2d 394 (8th Cir. 1945).

[236] Thompson v. Boles, 123 F. 2d 487, 494-5 (8th Cir. 1941); *cf.* Texas & P. Ry. Co. v. Buckles, 232 F. 2d 257 (5th Cir. 1956), *cert. denied* 351 U. S. 984 (1956).

[237] *See* Delaney v. New York Cent. R. Co., 68 F. Supp. 70, 72 (S.D.N.Y. 1946).

> sympathy. McKinney had a particularly winning and attractive personality and as he crept on his knees past the jury box to the witness stand and climbed upon the witness stand, he was quite an appealing sight.[238]

Other judges have credited the jury with stronger resistance to the inevitable appeal to their sympathy. In one case a motion was made to set aside a verdict of $165,000 for a man who had lost both legs, where the present value of his future earnings was $113,000. The defendant claimed the jury was unduly influenced by the sight of plaintiff sitting in a wheel chair, by the fact that he broke down and cried on the witness stand, and by the fact that his wife, who was crippled herself, testified that she could not properly attend plaintiff and care for his wants. But the court refused to interfere with the verdict.[239]

Misconduct is frequently claimed in the remarks hurled by counsel for one side at the other side. If these outbursts were onesided, of course they would require remedial action by the court. But they never are. When good lawyers are trying a case, there is no difficulty with claims of misconduct. But when one or both lawyers are less able, bickering between counsel is likely to arise. And when one lawyer starts calling names, his opponent would be less than human—and probably unfair to his client's interests—if he failed to retaliate. There can be no rule as to how much in such an exchange is to be chalked up to "the heat of oratory", and how much is to be regarded as an appeal to passion and prejudice.[240] On this issue particularly, much must be left to the trial judge, for he was in the courtroom, and has a better understanding of what really happened than can be obtained from the cold words in the printed record.

Excuses for finding verdicts excessive

As we showed earlier, many courts no longer require passion, prejudice, or corruption as a condition to setting a verdict aside. Here we examine some of the other standards appellate courts use to tamper with verdicts.

One popular recent claim is that the jury failed to make a deduction for plaintiff's own negligence. As is well known, FELA abolishes contributory negligence as a defense, and provides that if the plaintiff's negligence contributed to the injury, the damages awarded should be proportionately decreased.[241] Thus in the infamous *Wetherbee* case,[242] the Seventh Circuit—which at that time was still denying that it could do anything about an excessive verdict—said that the jury had given the maximum possible damages, that the workman had been negligent as a

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[238] McKinney v. Pittsburgh & L.E. R. Co., 57 F. Supp. 813 (S.D.N.Y. 1944).

[239] Delaney v. New York Cent. R. Co., 68 F. Supp. 70 (S.D.N.Y. 1946).

[240] The following cases are suggestive: Lanni v. Wyer, 219 F. 2d 701 (2d Cir. 1955); Missouri-K-T R. Co. v. Ridgway, 191 F. 2d 363 (8th Cir. 1951); James v. Chicago, St. P., M. & O. Ry. Co., 218 Minn. 333, 16 N.W. 2d 188 (1944); Devine v. Southern Pac. Co., 295 P. 2d 201 (Ore. 1956).

[241] 45 U.S.C. §53; Norfolk & W. Ry. Co. v. Earnest, 229 U.S. 114 (1913).

[242] Wetherbee v. Elgin, J. & E. Ry. Co., 191 F. 2d 302 (7th Cir. 1951), *cert. denied* 346 U.S. 867 (1953).

matter of law, and thus that the judgment could be reversed because of the error of the jury in failing to deduct for the workman's negligence.[243]

There are certain circumstances in which failure to deduct for contributory negligence would appear as a matter of law and would justify reversal. But these are quite limited circumstances indeed. First, plaintiff's negligence would have to appear as a matter of law.[244] Absent an admission of negligence or a special interrogatory finding plaintiff to have been negligent, an appellate court will rarely be able to say that plaintiff was negligent as a matter of law, in view of Supreme Court decisions which leave such questions to the jury as long as there is any evidence from which the jury could have concluded as it did.[245] Second, it would have to be a case in which the jury could not have found a violation of the Safety Appliance Act,[246] since there is no deduction for plaintiff's negligence if a violation of that act contributed in whole or part to the injury.[247] Finally, the appellate court would have to be able to say that the amount awarded was the maximum which the jury could have given had there been no issue of plaintiff's own negligence. Normally this will be true only where the jury has given the full amount sued for, or where it has answered a special interrogatory as to the total amount of plaintiff's damage. In the absence of such a showing, the appellate court will not be able to say that the jury failed to deduct for plaintiff's negligence, and will have to assume that the jury made such a deduc-

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[243] Remittiturs were ordered because of the failure of the jury to deduct for contributory negligence in Scneder v. Wabash R. Co., 272 S.W. 2d 198 (Mo. 1954), and Louisville & N. R. Co. v. Grizzard, 238 Ala. 49, 189 So. 303 (1939) *cert. denied* 308 U.S. 603 (1939).

[244] In the following cases it was held that there could be no reversal for failure to deduct for contributory negligence since it did not appear as a matter of law that plaintiff had been contributorily negligent. Missouri Pac. R. Co. v. Zolliecoffer, 209 Ark. 559, 191 S.W. 2d 587 (1946); Erickson v. Southern Pac. Co., 39 Cal. 2d 374, 246 P. 2d 642 (1952), *cert. denied* 344 U.S. 897 (1952); Jackson v. Rutledge, 188 Ind. 415, 122 N.E. 579 (1919); Padilla v. Atchison, T. & S. F. Ry. Co., 295 P. 2d 1023, 1027 (N.M. 1956); Schlatter v. McCarthy, 113 Utah 543, 196 P. 2d 968 (1948). The case of Atlantic C.L. R. Co. v. Taylor, 260 Ala. 401, 71 So. 2d 27 (1954), is especially interesting, for there the court refused to reverse though the verdict was for the full present worth of the proven contributions, and there was undisputed evidence the deceased had violated a company rule.

[245] *E.g.*, Union Pac. R. Co. v. Hadley, 246 U.S. 330, 334 (1918); Moore, *Recent Trends in Judicial Interpretation in Railroad Cases under the Federal Employers' Liability Act*, 29 MARQ. L. REV. 73 (1946); Alderman, *What the New Supreme Court Has Done to the Old Law of Negligence*, 18 L. & CONTEMP. PROB. 110 (1953); DeParcq, *A Decade of Progress under the Federal Employers' Liability Act, id.* at 259.

[246] 45 U.S.C. §§1 *et seq.* Thus in Atlantic Coast Line R. Co. v. Chapman, 84 Ga. App. 94, 65 S.E. 2d 629 (1951), the court rejected a contention that the evidence required a finding that plaintiff had been contributorily negligent, and that a verdict for the full amount demanded was therefore excessive, saying that the evidence would have permitted a finding that the injuries were due in part to a violation of the Safety Appliance Act.

[247] 45 U.S.C. §53; Coray v. Southern Pac. Co., 335 U.S. 520 (1949).

tion as required by its instruction.[248] So too, where it appears that the jury did make a deduction, an appellate court cannot reverse because the deduction was not large enough; it is for the jury to determine the percentage by which recovery is to be reduced.[249]

Failure of the jury to deduct for contributory negligence has some claim to validity as a reason for reversal, though as we have shown, it will be a highly unusual case in which all the necessary conditions for such a reversal will be present. Some of the other reasons on which appellate courts rely lack even this faint claim to being proper.

We have already alluded to the Missouri standard of comparison with past verdicts. In a typical case a 36 year old brakeman had had both legs amputated above the knees and suffered other injuries, and could only get around in a wheelchair. The trial court ordered a remittitur of $25,000 of the $165,000 verdict. But this was not enough for the Missouri Supreme Court, which cut an additional $60,000.[250] Thus the injured man was left with less than one-half the amount which the jury had awarded him. The court made no pretense of examining the evidence to see what the jury might justifiably have awarded for each of the elements of damage. Instead it found one of its own decisions 11 years before with, as it said, comparable injuries. In the older case the court had reduced an $85,000 verdict to $40,000.[251] The court agreed that some increase in the size of verdicts was justified, but decided that $80,000 was the maximum permissible for injuries of this sort. The court never mentions, and may not even have thought relevant, the fact that the plaintiff in the earlier case was 6 years older than the plaintiff in the later case, and that the jury could have found the latter had a gross earning capacity of $450 a month, as against $214 a month for the former.

The deficiencies of the "comparable verdicts" test are obvious. It completely abandons any attempt to compute damages scientifically, on the basis of the evidence. It deprives the jury of any real function in the award of damages.[252] And it is a purely one-sided rule, since verdicts are reduced to make them comparable with what has been allowed in the

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248 *See* Hall v. Chicago & N.W. Ry. Co., 5 Ill. 2d 135, 150, 125 N.E. 2d 77, 85 (1955): "However, by the very nature of the jury system, this court cannot indulge the presumption that juries do not follow the instructions of the courts."

249 *E.g.*, Starck v. Chicago & N.W. Ry. Co., 4 Ill. 2d 611, 625, 123 N.E 2d 826, 834 (1954).

250 Counts v. Thompson, 359 Mo. 485, 222 S.W. 2d 487 (1949).

251 Aly v. Terminal R. Assn. of St. Louis, 342 Mo. 1116, 119 S.W. 2d 363 (1938).

252 A striking example is presented by a case of an 18 year old brakeman, earning $250 a month, who had lost a leg and a thumb, sustained other fractures, and gotten osteomyelitis. At the first trial he was given a verdict of $175,000, and a new trial was ordered when he refused to remit $50,000. The verdict at the second trial was for $203,167. This verdict was held to be excessive by the "comparable verdicts" test, and a third trial ordered. Jones v. Pennsylvania R. Co., 353 Mo. 163, 182 S.W. 2d 157 (1944). At this point the weary plaintiff dismissed his state court action, sued in federal court, and got a verdict of $150,000, which was paid. See 5 NACCA L. J. 225 (1950).

past, but they are not increased if the jury awards less than some other jury has awarded for similar injuries.[253] Finally, the number of factors which should bear on damages is so great that it is naive to suppose that there will often be a precedent truly comparable.

A favorite argument of courts anxious to find a verdict excessive is to compare the verdict with the amount the injured person could have received were he subject to the state's workmen's compensation law.[254] By this test any tort verdict will look excessive.[255] The whole theory of workmen's compensation is that the few who might have recovered in a tort action give up the large verdict they could have had in order that their fellow workmen, who could not have recovered at common law, may receive some bare subsistence payments. Further, most people would agree that compensation payments are extremely inadequate, and would cringe from suggesting them as the standard for tort verdicts.

Quite similar to the workmen's compensation argument is the comparison, in a death case, with the amount that could have been recovered in a suit under the state wrongful death act.[256] Many states have an arbitrary limit on wrongful death actions. But Congress, like the legislatures of many other states, did not choose to write such a limitation into FELA, and the courts would not be justified in adding such a limit under the guise of reviewing excessive verdicts.[257]

A favorite technique in recent cases is to calculate the amount which plaintiff could receive in interest on the verdict given him, compare this with his past earnings history, and point out that he could enjoy this bountiful interest and at the end of his life still have the principal sum intact.[258] But this completely ignores pain and suffering, possibilities of future advancement, embarrassment and humiliation, the cost of future medical care, and all the other elements above mere loss of earnings which the jury must take into consideration.[259]

Those judges who have been most frank in cutting verdicts do not

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[253] "Present verdicts doubtless seem very high in view of past experience in this state, but it is just as valid a conclusion that injured men may have been awarded too little in the past as it is that they are awarded too much now." Bennett v. Denver & R.G.W. R. Co., 117 Utah 57, 73, 213 P. 2d 325, 332 (1950). See also the criticism of the comparison of verdicts test in Hahn v. Moore, 133 N.E. 2d 900, 908 (Ind. App. 1956).

[254] *E.g.*, Virginian Ry. Co. v. Armentrout, 166 F. 2d 400,407 (4th Cir. 1946); Bennett v. Denver R.R.G.W. R. Co., 117 Utah 57,70-1, 213 P. 2d 325,331 (1950).

[255] *See* Wolfe, J., concurring, in Bennett v. Denver & R.G.W. R. Co., 117 Utah 57,72, 213 F. 2d 235, 332 (1950).

[256] *E.g.*, United States v. Guyer, 218 F. 2d 266,268 (4th Cir. 1954); Becksted v. Skelly Oil Co., 131 F. Supp. 940, 944 (D.Minn. 1955).

[257] Western & A. R.R. v. Burnett, 79 Ga. App. 530, 54 S.E. 2d 357 (1949).

[258] *E.g.*, Southern Ry. Co. v. Neese, 216 F. 2d 772, 775-6 (4th Cir. 1954), *rev'd* 350 U.S. 77 (1955); Virginian Ry. Co. v. Armentrout, 166 F. 2d 400, 407 (4th Cir. 1948); Hallada v. Great Northern Ry., 244 Minn. 81, 97-8, 69 N.W. 2d 673, 686 (1955), *cert. denied* 350 U.S. 874 (1955).

[259] *See, e.g.*, Thompson v. Barnes, 236 S.W. 2d 656, 661 (Tex. Civ. App. 1950); Western & A.R.R. v. Burnett, 79 Ga. App. 530, 540, 54 S.E. 2d 357, 365 (1949); *cf.* Rivera v. Atchison, T. & S. F. Ry. Co., 299 P. 2d 1090 (N.M. 1956).

hide their reasons behind these pseudo-mathematical tests. These judges object to big verdicts merely because they are big:

> The way the amounts awarded in verdicts in personal injury cases have been rapidly increasing is a matter of concern to all who are interested in a fair and orderly administration of justice. If the amounts awarded in the next decade keep pace with the rate at which they increased in the last decade, in certain areas at least, verdicts of $150,000, $200,000, $250,000 or even greater sums may be expected. Even allowing for the decreased purchasing power of the dollar, many of the recent large awards for damages are not justified.[260]

One wonders on what theory of judicial notice the final sentence of the quoted excerpt rests. Or again:

> * * *[T]he maintenance of verdicts at a reasonable level is essential to the systematic functioning of our economic and business system. Distorted figures, if persistently reached in jury verdicts, will result in grave maladjustments and gross injustices. Plaintiff argues that such 'pseudo-economic' considerations have no place in a court decision. The Court feels otherwise. Judicial decisions must be rendered with a consciousness of all aspects of our society. Our law has been evolved for the purpose of regulating society.[261]

A state supreme court sounded a similar note, saying that "judicial care must be exercised lest a fatal financial burden be placed upon the industry out of sympathy for the plaintiff."[262] We agree with that thought. But we think courts should be even more assiduous to prevent a fatal financial burden from being allowed to remain on the injured workman out of sympathy for the industry.

To strike the balance true between employer and employee is the function of the jury. At the heart of all the arguments about appellate review are conflicting views on the jury system. A court which trusts the jury[263]—or which is at least willing to allow the jury to function

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[260] Wetherbee v. Elgin, J. & E. Ry. Co., 191 F. 2d 302, 309 (7th Cir. 1951), *cert. denied* 346 U.S. 867 (1953).

[261] Becksted v. Skelly Oil Co., 131 F. Supp. 940, 944 (D.Minn. 1955).

[262] Ahlstrom v. Minneapolis, St. P. & S.S.M. R. Co., 244 Minn. 1, 27, 68 N.W. 2d 873, 889 (1955).

[263] The United States Supreme Court has long been such a court. One of its most famous expressions on this subject is in Sioux City & Pac. R.R. Co. v. Stout, 84 U.S. 657, 663 (1874): "Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge."

For a collection of other encomia, see the rather bizarre opinion in Appli-

until our people adopt some new and supposedly better system—will leave the award of damages to the jury. A court which thinks that the jury is a useless appendage left over from an older day, somewhat on the same order with judicial wigs and the colorful language with which bailiffs open court, is going to ignore the jury and decide the amount of damages for itself. On this issue, we are glad to stand up and be counted. The most candid statement for appellate review is in a prophetic dissent by Judge Stephens, arguing that the appellate court should reduce a verdict whenever it thinks it is too high:

> While I fully realize the touchiness of a court's interference with a jury's judgment, I cannot believe that our system of jurisprudence places everybody's material fortune, such as our free enterprise enables us to accumulate, at the unbridled whim of any twelve men and women no matter how good and true they may be.[264].

We agree with the statement of the Florida Supreme Court:

> It must be left to the judgment and discretion of the jury what in dollars and cents is just and fair compensation for damages or injuries sustained by the fault or negligence of another. While the award is subject to review by an appellate court, we are not justified in disturbing it unless we find it to have been influenced by improper motives. To do otherwise would be to do away with our jury system.[265]

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cation of "Committee for the Preservation of the Constitutional Right to Trial by Jury, Inc.," 151 N.Y.S. 2d 1005 (Sup. Ct. 1956).

[264] Southern Pac. Co. v. Guthrie, 186 F. 2d 926, 934 (9th Cir. 1951) (dissenting opinion).

[265] Merwin v. Kellems, 78 So. 2d 865, 867 (Fla. 1955). See also the fine statement of Judge Gibson quoted p. 453 above.